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EDITOR'S NOTE

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o. 85-410-CFX
tatus: GRANTED

Title: Memphis Community School District, et al., Petitioners
v.
Edward J. Stachura

ocketed:
ugust 30, 1985

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Reisig, Donald R., Berardo, Patrick J.

Counsel for respondent: Ellmann, Erwin B., Heldt, Jeffery A.

ntry	Date	Note	Proceedings and Orders
1	Aug 30 1985	G	Petition for writ of certiorari filed.
2	Sep 28 1985		Brief of respondent Edward J. Stachura in opposition filed.
3	Oct 2 1985		DISTRIBUTED. October 18, 1985
4	Oct 21 1985		Petition GRANTED. limited to Questions I and III presented by the petition.
			**********
6	Nov 23 1985		Order extending time to file brief of petitioner on the merits until December 12, 1985.
7	Dec 6 1985		Joint appendix filed.
8	Dec 7 1985		Record filed.
9	Dec 7 1985		Certified copy of joint appendix and C.A. proceedings received. (3 volumes).
10	Dec 12 1985		Record filed.
11	Dec 12 1985		Certified copy of original record, 25 volumes, 2 boxes received.
12	Dec 12 1985		Brief amicus curiae of United States filed.
13	Dec 12 1985		Brief of petitioners Herbert Kubisch, et al. filed.
14	Dec 12 1985		Brief amicus curiae of National School Boards Assn. filed.
16	Jan 2 1986		Order extending time to file brief of respondent on the merits until January 17, 1986.
17	Jan 16 1986		Brief of respondent Edward J. Stachura filed.
18	Jan 17 1986		Brief amicus curiae of ACLU filed.
19	Feb 4 1986		SET FOR ARGUMENT, Wednesday, April 2, 1986. (4th case)
20	Feb 4 1986		CIRCULATED.
21	Mar 24 1986	X	Reply brief of petitioners Memphis Community Schools, et al. filed.
22	Apr 2 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-410

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Memphis Community Schools, et al,
Petitioners,

v

Edward J. Stachura,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

September 1, 1985

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QUESTIONS PRESENTED

I Whether the Court of Appeals erred by approving the District Court's jury instruction authorizing damages based upon the "intrinsic value" of both the substantive and procedural due process rights involved.

II. Whether the Court of Appeals erred by concluding that a suspension with pay coupled with adverse statements regarding that suspension constitutes a deprivation of property within the meaning of the Fourteenth Amendment.

III. Whether the Court of Appeals erred in affirming the decision of the District Court.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Memphis Community Schools, et al,
Petitioners,

v

Edward J. Stachura,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Memphis Community School District, Board of Education of the Memphis Community Schools, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Beatrice Dolan, and Donald C. Russell respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 3, 1985.

OPINIONS BELOW

The Judgment entered by the United States District Court, Eastern District of Michigan, appears in the record (R. 43-45)[1] and is reproduced in Appendix A. The memorandum Opinion of the United States District Court (R. 47-62) is unreported and appears in Appendix B. The

[1] All record citations refer to the parties' Joint Appendix, filed on appeal with the Sixth Circuit.

Opinion of the Sixth Circuit Court of Appeals, not yet reported, appears in Appendix C.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 3, 1985. The instant petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred by approving the District Court's jury instruction authorizing damages based upon the "intrinsic value" of both the substantive and procedural due process rights involved.

II. Whether the Court of Appeals erred by concluding that a suspension with pay coupled with adverse statements regarding that suspension constitutes a deprivation of property within the meaning of the Fourteenth Amendment.

III. Whether the Court of Appeals erred in affirming the decision of the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. XIV, § 1 (in pertinent part):

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983 (in pertinent part):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Article IV, § 1, Michigan Teacher Tenure Act, MCLA 38.101, MSA 15.2001 (in pertinent part):

> Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided.

STATEMENT OF THE CASE

Respondent was and is a tenured teacher in the Memphis Community School system and was responsible for teaching Life Science to 7th grade students (ages 11 through 15) during the 1978-79 school year (R. 214, 216, 219). On April 24, 1979, numerous parents[2] appeared at a special Board of Education meeting (a meeting called to discuss a local school millage) to complain about the manner in which Respondent conducted his Life Science class (R. 646-653, 758, 947, 1083, 1086). After the special Board meeting was adjourned, Defendant Delores Truszkowski, who was not a board member, read a statement to the Board of Education concerning Respondent's teaching methods. Amid parental threats to picket the school building and force their children to boycott Respondent's class, Superintendent Donald Russell suspended Respondent with full pay pending an investigation (R. 275, 276, 423, 438-439, 586-587, 1086, 1088, 1089).

Respondent filed a grievance on May 29, 1979 contesting his suspension with pay and requesting reinstatement to the classroom (R. 351, 416, 418, 461, 420, 420A, 420B, 560).[3] Respondent considered his grievance

[2] Petitioner Kubisch estimated the number to be between 60 and 70 (R. 758).

[3] Respondent never filed a grievance regarding a subsequent letter of reprimand (R. 540).

a "request for a hearing" in regard to his suspension (R. 428). Notwithstanding the fact that Respondent's collective bargaining agreement called for binding arbitration (R. 175-193), Respondent abandoned his grievance after a July 1979 Board of Education hearing which he refused to attend personally (R. 352, 420A, 420B).

Immediately after Respondent abandoned his grievance, the instant lawsuit was commenced in the United States District Court for the Eastern District of Michigan (R. 13-29). The Complaint filed by Respondent and one of Respondent's students (Plaintiff MacDonald) sought relief against the Board of Education, the individual Board Members, the former Superintendent of Schools, the then-Superintendent of Schools, the building Principal, and two private individuals (Defendants Moore and Truszkowski) (R. 13-29). After a lengthy trial, the jury awarded Respondent $275,000 in compensatory damages and $46,000 in punitive damages.[4] The jury found that Petitioners had deprived Respondent of his property interest in his employment and his liberty without due process of law and had deprived Respondent of his First Amendment rights (R. 1445-1448).

Petitioners and Defendant Truszkowski separately moved for Judgment Notwithstanding the Verdict. Petitioners' Motion asserted, among other errors, that the District Court erred when it instructed the jury:

> If you find that the Plaintiff has been deprived of a constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is

[4] The jury found in favor of Respondent as to Petitioners Kubisch, Walters, Guoin, Kelley, Delekta, Beaudrie, Dolan, Russell and the Board of Education; in favor of Respondent as to Defendant Truszkowski; against Respondent as to Defendants Moore, Phillips and Becker; and against Plaintiff MacDonald as to all Defendants (R. 43-45).

> appropriate. In one sense, no monetary value we place upon constitutional rights can measure their importance in our society or compensate a citizen adequately for the deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.
>
> The precise value you place upon any constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

(R. 1415-1416). Petitioners timely objected to this jury instruction on the basis of this Court's decision in Carey v Piphus, 435 U.S. 247 (1978) (R. 1440). The District Court, relying upon decisions by the Tenth and Eighth Circuit Courts of Appeals, rejected Petitioners' argument in this regard. See, Appendix B, at 8.

Petitioners also contended that Respondent failed to prove, as a matter of law, that he had been deprived of a cognizable "property interest," since Respondent had in fact not been terminated. The District Court rejected this argument as well, concluding that:

> the record contained testimony which gave rise to inferences that Stachura was terminated and that he was deprived of professional advantages. Stachura himself testified that he believed he had been dismissed. Indeed, the testimony of defendant Russell gave rise to an inference that Stachura was dismissed. This testimony would permit the jury to find that plaintiff had a property interest under the Tenure Act, and the employment contract.

See, Appendix B, at 4.

Defendant Truszkowski moved for Judgment Notwithstanding the Verdict on the grounds that her alleged wrongful conduct, filing complaints about a school teacher with the local board of education, was protected by her First Amendment right to petition the government for a redress of grievances. The District Court concluded that Ms. Truszkowski's conduct was constitutionally protected and granted her motion for JNOV. See, Appendix B, at 9.

Petitioners appealed the denial of their JNOV motion to the United States Court of Appeals for the Sixth Circuit. Respondent cross-appealed the District Court's decision granting Ms. Truszkowski's motion for JNOV. On June 3, 1985, the Sixth Circuit Court of Appeals affirmed the District Court's decision. See, Appendix C. Petitioners filed this Petition within 90 days of the Sixth Circuit's Judgment.

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS BELOW CONFLICT WITH THE COMPENSATION PRINCIPLE OF § 1983 LITIGATION ARTICULATED BY THIS COURT IN CAREY V PIPHUS, 435 U.S. 247 (1978), AS WELL AS THE DECISIONS OF OTHER COURTS OF APPEALS

The jury instruction given by the District Court and apparently approved by the Sixth Circuit[5] conflicts with the "cardinal principle of Anglo-American law" recognized by this Court in Carey v Piphus, 435 U.S. 247 (1978). Furthermore, the decisions of the courts below, which relied upon the decisions of the Tenth Circuit Court of Appeals in Corriz v Naranjo, 667 F.2d 892, cert. granted, 456 U.S. 971, cert. dismissed, 458 U.S. 1123 (1982) and the Eighth Circuit Court of Appeals in Herrera v Valentine, 653 F.2d 1220 (1981), directly conflict with the decision of the District of Columbia Circuit Court of Appeals in Doe v District of Columbia, 697 F.2d 1115, separate statements, 701 F.2d 948 (1983).

[5] The Court of Appeals concluded that "there was proof from which the jury could have found, as it did, actual and important damages." Appendix C, at 7.

In Carey v Piphus, this Court held that, in an action arising under 42 U.S.C. § 1983 for the deprivation of procedural due process, a plaintiff must prove actual injury resulting from a constitutional deprivation before he or she may recover substantial "non-punitive" damages. Justice Powell, writing for a unanimous Supreme Court stated, "[r]ights, constitutional and otherwise, do not exist in a vacuum." 435 U.S. at 254. Emphasizing that the "cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff," 435 U.S. at 255-56 (emphasis in original), the Court concluded that a plaintiff unable to prove actual injury as a result of an alleged deprivation of procedural due process rights would be entitled to recover only nominal damages.

In the case at bar, the jury found in favor of Respondent on his First Amendment claim, due process-property interest claim, and due process-liberty interest claim, in the amount of $275,000 compensatory and $41,000 punitive damages. See, Appendix A. The District Court's instruction authorized the jury to return a damage award on each claim "to compensate [Respondent] for the deprivation" in an amount potentially sufficient to reflect "the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the [Respondent] was engaged in at the time of the violation of the right." (R. 1415-1416). It is impossible to ascertain with any degree of certainty what weight the jury put on this instruction. However, the court sent written copies of all the instructions into the jury room during deliberations (R. 1418) — obviously compounding whatever emphasis was already placed on the erroneous instruction.

The District Court's instruction did not draw a distinction between damage awards based on substantive con-

stitutional violations (Respondent's First Amendment claim) and procedural constitutional violations (Respondent's Due Process claims) (R. 1411-1416). To the extent that this instruction authorized the jury to award damages based upon the importance of the First Amendment in our system of government and the role the First Amendment has played in the history of our republic, such instruction runs contrary to the principle articulated in Carey that "substantial damages should be awarded only to compensate actual injury. . . ." Carey, 435 U.S. at 266 (emphasis added).

The District Court approved this instruction based upon the Tenth Circuit Court of Appeals' decision in Corriz v Naranjo, 667 F.2d 892, cert. granted, 456 U.S. 971, cert. dismissed, 458 U.S. 1123 (1982) and the Eighth Circuit's decision in Herrera v Valentine, 653 F.2d 1220 (1981).

The court in Corriz, approving a jury instruction substantially similar to the one used below, distinguished this Court's decision in Carey solely on the basis that Carey involved a deprivation of procedural due process rights. 667 F.2d at 897. The Corriz court ruled that "although deprivation of civil rights is not a measure of damage, it most certainly is a compensable element of damage." 667 F.2d at 896.[6] In Herrera, the Eighth Circuit concluded that "[t]he holding in Carey was specifically limited to its facts." 653 F.2d at 1228. The Eighth Circuit then approved the identical jury instruction given in this case for the reason that "damage awards must take account of the intrinsic dimension that envelopes each substantive constitutional right." 653 F.2d at 1228.

These decisions conflict with the holding and analysis of the District of Columbia Circuit Court of Appeals in Doe v District of Columbia, 697 F.2d 1115, separate statements, 701 F.2d 948 (1983). In Doe, the Court of Appeals held that the trial court committed reversible error in granting the jury the authority to compensate

[6] The Tenth Circuit has recently reaffirmed its holding in Corriz. See, Bell v Little Axe Independent School District No. 10, __ F.2d __ (10th Cir. No. 83-1458, June 26, 1985).

prisoners for the value of the constitutional rights allegedly violated.[7] Relying upon this Court's decision in Carey, the Court of Appeals held that the instruction impermissibly authorized the jury to award damages based upon "the intrinsic value of their constitutional rights — evaluated 'upon consideration of equity, reason and pragmatism.'" 697 F.2d at 1122. The court expressly found the holding of Carey to be applicable to violations of substantive as well as procedural due process.

This Court has never resolved the issue raised by these cases, whether the "compensation principle" articulated in Carey applies to violations of substantive constitutional rights. The District of Columbia Circuit has concluded that Carey does apply to substantive constitutional violations since "the problems associated with leaving juries free to guess at the 'inherent value' of constitutional rights are equally germane to the two kinds of suits." Doe, 697 F.2d at 1123. The Tenth, Eighth, and (apparently) Sixth Circuits disagree.

The question presented is one of great importance in the context of Section 1983 litigation given the conflicting views of the Courts of Appeals. Petitioners respectfully urge this Court to issue a writ of certiorari in order to resolve this conflict among the circuits and address this issue of first impression.

Furthermore, a writ of certiorari should be granted for the reason that the decision by the Sixth Circuit so far departs from the accepted and usual course of judicial proceedings and so clearly conflicts with this Court's precedent as to call for an exercise of this Court's power of supervision. The challenged jury instruction authorized

[7] The District Court instructed the jury:

> If you find that defendant [sic] deprived plaintiffs of their constitutional rights, you may award plaintiffs damages for that deprivation. There is no precise formula for calculating these damages. Nevertheless, although the value of the plaintiffs' constitutional rights is difficult to assess, it must be considered. Thus, if you find that defendants violated plaintiffs' constitutional rights, you should arrive at a damage figure based upon consideration of equity, reason and pragmatism.

697 F.2d at 1122.

the jury to award damages for the mere deprivation of Respondent's due process rights.[8] An award of damages for the deprivation of procedural due process rights conflicts with this Court's holding in Carey, as well as the legion of cases following Carey. See e.g., Family Unidas v Briscoe, 619 F.2d 391, 402 (5th Cir. 1980); Davis v Village Park II Realty Co., 578 F.2d 461, 463 (2d Cir. 1978); and Freeman v Franzen, 695 F.2d 485, 492 (7th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 3553 (1983).[9]

Since the case at bar involved a procedural due process claim such as that found in Carey, the District Court and the Sixth Circuit Court of Appeals clearly departed from the accepted course of proceedings by permitting the jury to award damages based upon the "intrinsic value," the mere deprivation, of procedural due process. Given the ever-increasing number of civil rights lawsuits under Section 1983 involving procedural due process issues, Petitioners request that this Court exercise its power of supervision to correct the manifest and unconscionable error by the courts below.

II.

THE DECISIONS BELOW RAISE A SIGNIFICANT ISSUE OF FIRST IMPRESSION BY CREATION OF A NEW SPECIES OF PROPERTY INTEREST DEPRIVATION PREVIOUSLY UNRECOGNIZED IN § 1983 LITIGATION

The Due Process Clause of the Fourteenth Amendment requires that, prior to the time an individual is de-

[8] The instructions did not distinguish between damage awards for procedural versus substantive constitutional rights (R. 1411-1416).

[9] In the case at bar, the Court of Appeals concluded that "there was proof from which the jury could have found, as it did, actual and important damages." Appendix C, at 7. This conclusion misstates the issue. While the jury may have concluded that Respondent's evidence of general damages had a "value" of $275,000, it is equally plausible that a portion, if not a substantial amount, of the damages were awarded merely for the perceived deprivation. As the Court of Appeals found in Doe v District of Columbia, 697 F.2d at 1125 "[t]he likelihood that [the jury] obeyed that instruction is sufficiently great to necessitate a new trial."

prived of a significant property interest, that individual must be given notice and a reasonable opportunity to be heard. Cleveland Board of Education v Loudermill, __ U.S. __, 105 S.Ct. 1487, 1493, __ L.Ed.2d __ (1985). There is no doubt that Respondent had a property right to continued employment with the Memphis Community Schools and the trial court correctly instructed the jury on this issue (R. 1402-1404). Furthermore, if Petitioners deprived Respondent of a property interest, Petitioners were obligated to provide a hearing. The issue presented by this case, however, concerns whether Respondent was "deprived" of his property interest by his being "effectively discharged".

The Sixth Circuit Court of Appeals concluded that Respondent's "property interests were invaded by his being effectively discharged." See, Appendix C, at 7. However, it is undisputed that Respondent was suspended with pay on April 24, 1979 (R. 276, 587, 1088-1089). Notwithstanding this fact, Respondent's theory of the case was based upon the fact that he was "discharged" (R. 1380). The District Court concluded that the evidence gave rise to "inferences" that Respondent had been terminated, emphasizing Petitioner Russell's remark that Respondent would never teach in the Memphis Community Schools again and that Respondent "himself testified that he believed he had been dismissed." See, Appendix B, at 4.

In Loudermill, the Court appeared to approve the previously accepted view that temporary suspensions with pay do not constitute deprivations of property sufficient to implicate Fourteenth Amendment due process rights. Justice White wrote, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, . . . it can avoid the problem by suspending with pay." 105 S.Ct. at 1495 (footnote omitted, emphasis added).

At trial, the District Court correctly instructed the jury that Respondent's "property interests" could only arise either pursuant to the Michigan Teacher Tenure Act or Respondent's collective bargaining agreement (R. 1402-

1404). Under the Michigan Teacher Tenure Act, Respondent could not be "discharged" or "demoted" without just cause. MCLA 38.101; MSA 15.2001. The District Court instructed the jury that Respondent could not be found to have been "discharged" unless he was "fully terminated" and could not be found to have been "demoted" unless he suffered a loss of pay (R. 1403). Under the collective bargaining agreement, Respondent could similarly not be discharged or disciplined without just cause (R. 1403-1404).[10]

Respondent's theory regarding his "discharge" appears to be akin to the "constructive discharge" theory recognized by the Michigan Court of Appeals in LeGalley v Bronson Community Schools, 127 Mich.App. 482, 486-487, 339 N.W.2d 223 (1983). As the Michigan Court of Appeals held in LeGalley, however, a constructive discharge requires the actual termination of the employment relationship. See also, Sure-tan, Inc v National Labor Relations Board, __ U.S. __, 104 S.Ct. 2803, 2810, 81 L.Ed.2d 732 (1984) and Shawgo v Spradlin, 701 F.2d 470 (5th Cir. 1983).

The Court of Appeals' holding creates either a new federal species of property interest (a property interest in not being suspended with pay) or a revolutionary property deprivation analysis (Respondent's "property interest" in his employment was deprived by his being "effectively discharged"). The Court of Appeals' decision appears to require pre-suspension (with pay) hearings, similar to the pre-discharge hearings required by Loudermill.[11]

The Sixth Circuit's holding establishes a completely new precedent and creates a new species of federal

[10] Respondent's entire theory of the case centered on his perceived "discharge" (R. 1380).

[11] From a practical standpoint, few employers would bother to impose a suspension with pay as a predisciplinary or investigatory tool if, in fact, predeprivation suspension (with pay) hearings were required. The suspension with pay has been utilized in those circumstances where immediate action was required pending final action or investigation.

"property interest", contrary to this Court's holding in Board of Regents v Roth, 408 U.S. 564, 577 (1972), (property interests "are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law . . ."). The Sixth Circuit, in effect, manufactured a "property interest" centered not on an interest arising out of state law, but arising solely from Respondent's subjective understanding of his employment status. This species of property interest, an "entitlement" based upon what a person could "reasonably believe", does not rely upon any prior Michigan or Federal law, and in fact constitutes a "unilateral expectation" which does not warrant due process protection.

Supreme Court review of this decision is especially significant considering this Court's recent decision in Cleveland Board of Education v Loudermill. Justice White, writing for the majority, appeared to sanction suspensions with pay in circumstances such as these.[12] While Justice Marshall, concurring in part and dissenting in part, argued in favor of a more formal predeprivation hearing, he also emphasized that "an opportunity to test the strength of the evidence" must be provided "before the decision is made to terminate an employee's wages. . . ." Cleveland Board of Education, 105 S.Ct. at 1497. Thus, Justice Marshall also implicitly recognized the constitutional validity and practical necessity of suspensions with pay.

Since the decision of the Sixth Circuit holding that Respondent's temporary suspension with pay amounted to a deprivation of his "property interests" raises a question never before presented or resolved by this Court and appears to conflict with this Court's reasoning in Loudermill, Petitioners respectfully request that this Court issue a writ of certiorari to review this decision.

[12] During the April 24, 1979 Board of Education meeting, parents threatened to boycott Respondent's classes and picket the school building. The threatened disruption of the school district the following day prompted Petitioner Russell to suspend Stachura with full pay pending an investigation (R. 586-587, 1083-1088).

Furthermore, since no cases have been discovered supporting the Court of Appeals' ruling that a temporary suspension with pay amounts to an "effective discharge", that decision so far departs from the accepted course of judicial norms and employment practices as to call for an exercise of this Court's power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. STACHURA and JAMES DAVID MacDONALD, by his Next Friend, JANET E. MELTON,

Plaintiffs,

CIVIL ACTION
NO.: 79-30022

v

MEMPHIS COMMUNITY SCHOOL DISTRICT a public body, BOARD OF EDUCATION OF THE MEMPHIS COMMUNITY SCHOOLS, HERBERT KUBISCH, GENEVIEVE WALTERS, MARGARET GUOIN, TIMOTHY KELLY, LAWRENCE DELEKTA, ERNEST BEAUDRIE, BEATRICE DOLAN, MARILYN MOORE, DONALD C. RUSSELL, ROBERT PHILLIPS, CHARLES BECKER, and DELORES TRUSZKOWSKI,

Defendants.

JUDGMENT

This action having come on for trial before the Court and a jury, the issues having been duly tried and the jury having rendered its answers to special interrogatories;

IT IS ORDERED AND ADJUDGED that the Plaintiff, Edward J. Stachura, recover from the Defendant, Board of Education of the Memphis Community Schools, the sum of Two Hundred Thirty Three Thousand Seven Hundred Fifty and no/100 ($233,750.00) Dollars in compensatory damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plantiff, Edward J. Stachura, recover from the defendant, Herbert Kubisch, the sum of Eight Thousand Two Hundred Fifty and no/100 ($8,250.00) Dollars in compensatory damages and Fifteen Thousand and no/100 ($15,00.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, recover from the defendant, Genevieve Walters, the sum of Two Thousand Seven Hundred Fifty and no/100 ($2,750.00) Dollars in compensatory damages and One Thousand and no/100 ($1,000.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, recover from the defendant, Margaret Guoin, the sum of Two Thousand Seven Hundred Fifty and no/100 ($2,750.00) Dollars in compensatory damages and One Thousand and no/100 ($1,000.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, recover from the defendant, Timothy Kelley, the sum of Two Thousand Seven Hundred Fifty and no/100 ($2,750.00) Dollars in compensatory damages and One Thousand and no/100 (1,000.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, recover from the defendant, Lawrence Delekta, the sum of Two Thousand Seven Hundred Fifty and no/100 ($2,750.00) Dollars in compensatory damages and One Thousand and no/100 ($1,000.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff Edward J. Stachura, recover from the defendant, Ernest Beaudrie, the sum of Two Thousand Seven Hundred Fifty and no/100 ($2,750.00) Dollars in compensatory damages and One Thousand and no/100 ($1,000.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, recover from the defendant, Beatrice Dolan, the sum of Two Thousand Seven Hundred Fifty and no/100 ($2,750.00) Dollars in compensatory

damages and One Thusand and no/100 ($1,000.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, recover from the defendant, Donald G. Russell, the sum of Eight Thousand Two Hundred Fifty and no/100 ($8,250.00) Dollars in compensatory damages and Fifteen Thousand and no/100 ($15,000.00) Dollars in punitive damages with interest thereon as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, recover from the defendant, Delores Truszkowski, the sum of Eight Thousand Two Hundred Fifty and no/100 ($8,250.00) Dollars in compensatory damages and Ten Thousand and no/100 ($10,000.00) Dollars in punitive damages with interest thereon as provided by law

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, take nothing from the defendants, Marilyn Moore, Robert Phillips, and Charles Decker.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, James David MacDonald, take nothing and his claims against the defendants be dismissed.

Costs taxed to defendants.

Dated this 2nd day of July, 1982 in Port Huron, Michigan.

ROBERT A. MOSSING, CLERK

/s/ Kim Foster
By KIM A. FOSTER, Deputy Clerk

Approved as to form pursuant to FR Civ P 58

/s/ James Harvey
JAMES HARVEY
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

EDWARD J. STACHURA and JAMES DAVID MacDONALD, by his Next Friend JANET E. MELTON,

Plaintiffs,

v Civil No: 79-3022

MEMPHIS COMMUNITY SCHOOL DISTRICT, et al,

Defendants.

MEMORANDUM OPINION AND ORDER

At a session of said court, held in the Federal Building, Bay City, Michigan on the 11th day of April, 1983.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

Plaintiffs brought this action pursuant to 42 USC 1983. Plaintiff Stachura was a junior high school biology teacher in the Memphis Community School District. In April of 1979, a few parents in the Memphis School District alleged that Stachura was behaving improperly in the classroom and teaching "sex education" in an extremely insensitive manner. These allegations were made public at a school board meeting held on April 23, 1979. As a result of the meeting, Stachura was suspended with pay. This suspension had the effect of removing Stachura from the classroom for the remainder of the academic year. Both the allegations of impropriety and the subsequent suspension received widespread publicity. Plaintiff James MacDonald was a student in one of Stachura's classes during the 1979 academic year.

The defendants in this case include the school board members who held office in April of 1979. Certain school administrators were also named as defendants, along with two parents who were alleged to have conspired with the school board.

Plaintiff Stachura maintained that the actions of the defendants had deprived him of his right to "academic freedom." In addition, Stachura claimed that the actions of the defendants had deprived him of liberty and property without due process of law. Plaintiff MacDonald claimed that he also had an interest in "academic freedom" which the defendants had infringed.

At the close of trial, the jury returned a verdict in the form of answers to ten interrogatories. The jury found in favor of plaintiff Stachura, but against plaintiff MacDonald. The jury awarded Stachura $275,000 in compensatory damages, and $46,000 in punitive damages. However, the jury did not find that all the defendants were liable to Stachura, and different damage amounts were assigned to those who were found liable.

This matter is before the Court on the following motions:

1.) Defendants Memphis Community School District, Board of Education of the Memphis Community Schools, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelly, Lawrence Delekta, Ernest Beaudrie, Beatrice Dolan and Donald C. Russell's (hereinafter, the school board defendants) motion for judgment notwithstanding the verdict;

2.) The school board defendant's motion in the alternative for a new trial or remittitur;

3.) Defendant Truszkowski's motion for judgment notwithstanding the verdict;

4.) Defendant Truszkowski's motion in the alternative for a new trial or remittitur.

The Court will address these motions in the order listed above.

I. The School Board Defendants' Motion for a Judgment Notwithstanding the Verdict.

Judgment notwithstanding the verdict (JNOV) is proper only if the evidence is such that there can be but one reasonable conclusion as to the proper verdict. If there is sufficient evidence which would permit a reasonable jury to find for plaintiff, then a motion for JNOV should not be granted. Greer v United States, 408 F 2d 631 (CA6, 1969). In deciding a motion for JNOV, the Court must view the evidence in the light most favorable to the party against whom the motion is made, while also giving that party the advantage of every reasonable inference the evidence can justify. National Plymer Products v Borg Warner Corp.,660 F 2d 171, (CA6, 1981). The school board defendants argue that a JNOV is warranted because of the plaintiff's failure of proof in the following areas:

A.) Plaintiff Stachura's first amendment claim;

B.) Plaintiff Stachura's property interest claim;

C.) Plaintiff Stachura's liberty interest claim;

D.) The defense of good faith immunity;

E.) The award of punitive damages.

The Court will analyze each of these issues in the order listed above, looking for sufficient evidence to raise a question of fact for the jury. If there is sufficient evidence to permit a reasonable jury to find for plaintiff, then the court must deny the motion for JNOV.

A.) Plaintiff Stachura's First Amendment Claim

The school board defendants claim that no evidence was presented which would permit a conclusion that Stachura's first amendment freedoms were infringed. The Court believes that its instructions on Stachura's first amendment claim were a correct exposition of the standards which should guide the jury in evaluating this claim. Specifically, the jury was instructed that the plaintiff's "academic freedom" is limited by the right of the school board to inculcate community values through control of the substantive content of the curriculum. However, the jury was also instructed that an instructor's teaching methods are entitled to first amendment protection as long as the substantive values the school board seeks to inculcate are not subverted by those methods. McGill v Board of Ed of Pekin Elementary School, 602 F 2d 774 (CA7, 1979); East Hartford Ed Ass'n v Board of Ed of the Town of East Hartford, 562 F 2d 838 (CA2, 1977).

Evidence was presented that the biology text used by Stachura was approved by the board of education, as was the film used to supplement the text discussion of reproduction. Stachura testified concerning the instruction techniques he used in teaching reproduction. This testimony was at odds with the allegations of the parents and the claims of the defendants. Moreover, plaintiff was suspended only after a vehement protest by certain parents; evidence which certainly raises the inference that Stachura was suspended in retaliation for his allegedly improper teaching methods. This evidence would permit a reasonable jury to find for plaintiff Stachura. Thus, questions of credibility and issues of fact arose which were properly submitted to the jury. JNOV will not lie under this theory.

B.) Plaintiff Stachura's Property Interest Claim

The school board defendants do not challenge the Court's instructions in this area. Rather, they claim that no evidence was presented which established a property interest entitled to protection. And, in the alternative, if there were such an interest, defendants claim that an adequate hearing was given. The Court instructed the jury that, under the facts of this case, a property interest could arise in either of two ways. First, the Michigan Teacher Tenure Act gives rise to a property interest if the teacher is "discharged" or "demoted". MCLA 38.101. Second, Stachura's contract of employment gives rise to a property interest if a teacher is disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage.

As is fully detailed in plaintiff's brief in opposition to the motion for JNOV, the record contained testimony which gave rise to inferences that Stachura was terminated and that he was deprived of professional advantages. Stachura himself testified that he believed he had been dismissed. Indeed, the testimony of defendant Russell gave rise to an inference that Stachura was dismissed. This testimony would permit the jury to find that plaintiff had a property interest under the Tenure Act, and the employment contract. If such a property interest were found, the record also contained evidence which raised issues as to whether an adequate

hearing was held. Accordingly, the school board defendants' motion for JNOV will not succeed on this ground.

C.) Plaintiff Stachura's Liberty Interest Claim

Under this claim, the school board defendants contend that the evidence presented did not permit a finding that plaintiff's liberty interests were infringed. In addition, the defendants claim that a suspension with pay cannot constitute an infringement of a liberty interest. Finally, the school board defendants argue that even if the plaintiff's liberty interests were infringed, then a sufficient due process hearing was afforded.

Turning first to the question of whether plaintiff's liberty interests were infringed, the Court instructed the jury that a liberty interest is infringed if the actions of the school board defendants imposed a stigma on Stachura, and foreclosed a definite range of employment opportunities that the plaintiff would otherwise have had available to him. Board of Regents v Roth, 408 US 564 (1972); Perry v Sinderman, 408 US 593 (1972). The plaintiff presented an extensive amount of evidence which detailed the stigma resulting from the various actions by the school board defendants. Furthermore, testimony by Professor Grinstead detailed how plaintiff's employment possibilities would be foreclosed. Thus, a reasonable jury could find for plaintiff on this ground, and JNOV is thus inappropriate.

In discussing whether plaintiff's liberty interests were infringed, the defendants also argue that a suspension with pay was not sufficient to trigger a liberty interest. This argument flows from the decision in Paul v Davis, 424 US 693 (1976), which held that defamation by a state defendant is not enough to establish that a liberty interest has been infringed. Rather, the defamation must occur in the context of a termination of the employee, or the infringement of an employment interest protected by state law. The school board defendants assert that the question of whether a suspension with pay and subsequent transfer meet the requirements of Paul was answered in Sullivan v Brown, 544 F 2d 279 (CA6, 1979). In Sullivan, the Court of Appeals held that "A transfer under the circumstances of this case does not give rise to a due process right." Sullivan v Brown, id at

283 (emphasis added). The Court believes the circumstances of the instant case give rise to a due process right. Stachura was removed from the classroom under circumstances which invited stigmatization. Given the humiliating nature of the publicity surrounding the removal, Stachura had a right to a forum which would permit an opportunity for swift public vindication. Plaintiff's liberty interest claim was properly submitted to the jury.

Finally, the school board defendants argue that the plaintiff was afforded a sufficient hearing and defendants are thus entitled to JNOV. The Court instructed the jury that, at a minimum, due process requires that the plaintiff must be given adequate notice of the reasons for the action against him, and a hearing. Board of Regents v Roth, supra. Stachura presented evidence which raised the inference that he was never given adequate notice concerning the basis for the actions against him, or any opportunity to present his position in a fair way. Thus, the school board defendants are not entitled to JNOV on this basis.

D.) Defendants' Claim of Good Faith Immunity

The school board defendants claim that the evidence in the records permits only the conclusion that they acted in good faith. The court's instruction on the defense of good faith immunity was in accord with Wood v Strickland, 420 US 308 (1975). The Court's instruction also comports with more recent expositions of the standards governing good faith immunity, where the Supreme Court has stated that goverment officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory and constitutional rights of which a reasonable person would have known." Harlow v Fitzgerald, ____US __, 102 S. Ct 2727, 73 L Ed 2d 396, 410 (1982). From the statements of various board members, inferences were clearly raised that defendants knew they were violating Stachura's statutory and constitutional rights. This evidence, along with the actions of defendants, would permit a juror to conclude that the defendants were violating clearly established constitutional and statutory rights, of which a reasonable person would have known.

The defendants also complain that the Court's instructions of good faith immunity improperly shifted the burden of persuasion to the defendants. The Court believes that the burden was properly placed on the defendants asserting the immunity. In discussing good faith immunity, the Supreme Court stated that "...if the official pleading the defense... can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." Harlow v Fitzgerald, id at 411 (emphasis added). This language implies that the burden was on the defendants, and the Court will not grant a motion for JNOV on the basis that the burden of proof was incorrectly shifted.

E.) Puntive Damages

The school board defendants argue that the punitive damage awards in this case were completely unsupported by the evidence. The jury was instructed that they could, in their discretion, award punitive damages if they found an individual defendant had acted maliciously, wantonly or oppressively. Morrow v Igleburger, 384 F 2d 787 (CA6, 1978). As delineated in plaintiff's brief, various statements and actions on the part of the defendants indicate that they acted maliciously or wantonly. In the context of this case, the inaction of the defendants can often be construed as being maliciously motivated. Thus, sufficient evidence existed to permit the awarding of punitive damages.

In summary, for the reasons stated above, the school board defendants' motion for a judgment notwithstanding the verdict is hereby DENIED.

II. The School Board Defendants' Motion for a New Trial or in Lieu Thereof, a Remittitur

The school board defendants claim that a new trial is warranted because of an excessive damage award, a purported error in instructing on the monetary value of a deprivation of constitutional rights, and a flaw in the special interrogatories submitted to the jury. The power of a trial court to order a new trial in a jury case is a limitation on the jury's power to render a verdict, and is designed to prevent gross injustice. Montgomery Ward & Co v Duncan, 311 US 243 (1940). The improper admission of evidence is a ground for a new trial, as is the giving of an erroneous instruction

or in the failure to give a proper requested instruction, but only if such errors are prejudicial. 6A Moore's Federal Practice and Procedure, Section 59.08 (2) at 59-82, 96. On a new trial motion, unlike on a motion for JNOV, the trial court may weigh the evidence. The decision to grant or deny a new trial is one confided to the sound discretion of the trial court. TCP Indus, Inc v Uniroyal, Inc, 661 F 2d 542 (CA6, 1981).

Defendants' first contention is that the damage award is excessive. The Court will not substitute its judgment for that of the jury, unless the verdict is either shocking to the conscience or is the result of prejudice, passion, or other improper influences. Because this verdict does not shock the conscience, and because there is no showing of improper influence, the Court will not award a new trial based on an excessive damage award. Since there is not an excessive verdict which warrants a new trial, remittitur is also inappropriate. See generally, 11 Wright and Miller, Federal Practice and Procedure, Section 2815 at p 99.

Defendants' next argument is that the instruction concerning damage relief for the deprivation of constitutional rights is flawed. The Court would agree that such damages are difficult to measure, but nevertheless, they should be available in a case like the present one. Corriz v Naranjo, 667 F 2d 892 (CA10, 1981); Herrera v Valentine 653 F 2d 1220 (CA10, 1981). Although the instant case does not involve a physical injury like Herrera, the mental anguish, destruction of reputation, and personal humiliation which arguably flowed from the defendants' actions justify the Court's instruction on damage relief for constitutional deprivations.

Finally, defendants argue that it was error for the Court to submit interrogatories to the jury which failed to distinguish between damages that resulted from a deprivation of a liberty interest and damages that resulted from a deprivation of a property interest. The defendants did not object to this aspect of the interrogatory form at trial. Thus, the issue is not properly before the Court, and will not support a motion for a new trial. FR Civ P 51.

Accordingly, for the reasons stated above, the school board defendants' motion for a new trial or remittitur is hereby DENIED.

III. Defendant Truszkowski's Motion for a Judgment Notwithstanding the Verdict

In April of 1979, defendant Truszkowski was not a school board member. Her role during that time was a private citizen complaining about Stachura to the school board. Plaintiff alleged that Truszkowski conspired with the school board to infringe on his rights. Defendant Truszkowski proceeded in propria persona at trial. The thrust of her defense was that she was merely petitioning the government for a redress of grievances. In the postjudgment phase of trial, defendant Truszkowski is being assisted by counsel for the school board defendants. Once again, the thrust of Truszkowski's argument is that her actions were privileged because she was petitioning the government pursuant to the first amendment.

When a private citizen petitions his government for redress of grievances, that citizen's actions are absolutely privileged unless the citizen is abusing the legislative or administrative processes. Gorman Towers, Inc v Bogoslavsky, 626 F 2d 607 (CA8, 1980); Weiss v Willow Tree Civic Association, 467 F Supp 803 (S.D. NY, 1979). A petitioner abuses the legislative process if, by a pattern of conduct, the petitioner effectively closes to the other parties the "machinery of the agencies and the courts." Willow Tree Civic Association, id, at 818 (quoting California Motor Transport Co v Trucking Unlimited, 404 US 508 (1972).

In the instant case, it is clear that defendant Truszkowski was petitioning the government for redress of grievances. Moreover, even viewing the evidence in the light most favorable to the plaintiff, there is no evidence that Truszkowski was abusing the legislative process. Accordingly, defendant Truszkowski's motion for a judgment notwithstanding the verdict is hereby GRANTED. An appropriate judgment will be entered.

IV. Defendant Truszkowski's Motion for a New Trial or Remittitur

Although the Court has granted defendant Truszkowski's motion for JNOV, FR Civ P 50 (c) provides that the Court

must conditionally rule on Truszkowski motion for a new trial. Truszkowski claims that a new trial is warranted because of an error in jury instructions, an error in the form of the special interrogatories, and an excessive damage award. Truszkowski's arguments in support of these grounds for new trial mirror the arguments advanced by the school board defendants. For the reasons stated when addressing the school board defendants' motion for a new trial, the Court CONDITIONALLY DENIES defendant Truszkowski's motion for a new trial.

V. Conclusion

Accordingly, for the reasons stated, the Court hereby rules as follow:

1. Defendants Memphis Community School District, Board of Education of the Memphis Community Schools, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelly, Lawrence Delekta, Ernest Beaudrie, Beatrice Doland, and Donald C. Russell's motion for judgment notwithstanding the verdict is DENIED.
2. Defendants Memphis Community School District, Board of Education of Memphis Community Schools, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelly, Lawrence Delekta, Ernest Beaudrie, Beatrice Dolan, and Donald C. Russell's motion for a new trial or remittitur is DENIED;
3. Defendant Truszkowski's motion for judgment notwithstanding the verdict is GRANTED;
4. Defendant Truszkowski's motion for a new trial or remittitur is CONDITIONALLY DENIED.

IT IS SO ORDERED.

/s/ James Harvey
JAMES HARVEY
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

EDWARD J.STACHURA and JAMES DAVID MacDONALD, by his Next Friend, JANET E. MELTON,

Plaintiffs,

v Civil No: 79-30022

MEMPHIS COMMUNITY SCHOOL DISTRICT, et al,

Defendants.
_____/

JUDGMENT NOTWITHSTANDING THE VERDICT

At a session of said court, held in the Federal Building, Bay City, Michigan on the 11th day of April, 1983.

PRESENT: HONORABLE JAMES HARVEY
United State District Judge

Pursuant to the Court's Memorandum Opinion and Order granting defendant Truszkowski's motion for a judgment notwithstanding the verdict, IT IS SO ORDERED AND ADJUDGED that the plaintiff, Edward J. Stachura, take nothing from the defendant Dolores Truszkowski, and his claims against Dolores Truszkowski be dismissed. As to the other defendants, the judgment entered on July 2, 1982, is in no way altered.

Dated this 11th day of April, 1983, in Bay City, Michigan.

/s/ James Harvey
JAMES HARVEY
United States District Judge

Appendix C

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 82-1575, 83-1344, 83-1345

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD J. STACHURA,
Plaintiff-Appellant, (83-1344),

v.

DELORES TRUSZKOWSKI,
Defendant-Appellee.

EDWARD J. STACHURA, et al,
Plaintiffs-Appellees, (82-1575),
Cross Appellees, (83-1345),

v.

MEMPHIS COMMUNITY SCHOOL DISTRICT, a public body, BOARD OF EDUCATION OF THE MEMPHIS COMMUNITY SCHOOLS, HERBERT KUBISH, GENEVIEVE WALTERS, MARGARET GUOIN, TIMOTHY KELLEY, LAWRENCE DELEKTA, ERNEST BEAUDRIE, BEATRICE DOLAN and DONALD D. RUSSELL,
Defendants-Appellants, (82-1575),
Cross Appellants, (83-1345).

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 3, 1985

Before: EDWARDS* and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

EDWARDS, Circuit Judge. Plaintiffs Edward Stachura and James MacDonald brought this action under 42 U.S.C. § 1983. They alleged violations of plaintiff Edward Stachura's rights under the Fourteenth Amendment guarantees of liberty and property against the Memphis Community School Board, the Memphis Community School District, individual members of the School Board, Donald Russell, School Superintendent, during the period involved, Robert Phillips, school superintendent who succeeded Donald Russell, Charles Becker, Principal of the Memphis Middle School and two private citizens, Delores Truszkowski and Marilyn Moore. As to all of the individuals, plaintiffs alleged a conspiracy to violate their First Amendment rights as a teacher in the instance of Stachura and as a student in the instance of MacDonald. After a lengthy jury trial, the jury found in favor of plaintiff Stachura against most of the defendants (including Truszkowski) and against plaintiff MacDonald in all of his claims.

Two motions for judgment n.o.v. were filed. Truszkowski filed one such motion relying on the First Amendment. The School Board, its members and the named school officials also filed a motion for judgment n.o.v.

Judge Harvey granted judgment notwithstanding the verdict to defendant Truszkowski and plaintiff Stachura appeals. The jury had found $18,250 damages, $10.000 of which were punitive, against Truszkowski. Judge Harvey set these judgments aside. He held that Truszkowski was entitled to immunity on the basis of the right to petition contained in the First Amendment to the Constitution of the United States.

As to the second appeal named above, Stachura v. Memphis Community School Board, et al., the Board and other named defendants-appellants, appeal from a jury award of $321,000 punitive and compensatory damages.

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* Hon. George Edwards took senior status January 15, 1985.

Judge Harvey wrote a lengthy opinion dealing with the two appeals which have been taken in this case. We have reviewed that opinion and adopt and rely upon it. Additionally, however, we make the following comments about the two appeals.

Stachura v. Truszkowski

Appellee Truszkowski was responsible for starting the sequence of events which transpired in these two cases. She organized and transmitted complaints to the School Board concerning Stachura's teaching of a Life Science class alleging improper teaching methods. Various other parents in the community joined her subsequently in vehement and continuing protests, based on unfounded rumours, leading directly to Stachura's removal. Although Truszkowski's role was pivotal in initiating these protests, it was made to the public body having charge of the educational system in the community concerned. As such, it was protected, as the District Judge held, by the right to petition encompassed in the First Amendment to the Constitution of the United States. In applicable part the First Amendment says: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." While Ms. Truszkowski's role in these events is not a pretty one, we agree with the District Judge that it was a petition addressed to the proper authority and as a consequence, her actions were immunized from this suit by her First Amendment rights. *Gorman Towers* v. *Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980); *see California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961).

For these reasons, we affirm the judgment of the District Court in entering judgment notwithstanding the verdict thus setting aside the jury's verdict against defendant Truszkowski.

Stachura v. Memphis Community School District, et al.

As to Stachura's suit against the School Board and other defendants, we again find ourselves in agreement with the District Judge. The record in this case, when the motion for judgment notwithstanding the verdict is considered, must be viewed in the light most favorable to the party against whom the motion is made while giving that party the advantage of any reasonable inference the evidence can justify. The District Judge rejected defendants' position on Plaintiff Stachura's First Amendment claim, his property interest claim, his liberty interest claim, the defense of good faith immunity and the question of punitive damages. As the District Judge pointed out, the text he used in teaching the Life Science class was approved by the School Board itself. The Life Science text included the following outline of Chapter 12 entitled "Reproduction."

CHAPTER 12 REPRODUCTION 205
The Nature of the Process 205
Cells can reproduce themselves • Cells can grow • Cells can specialize • Lesson Review

Asexual and Sexual Reproduction 209
Asexual reproduction is simple and fast • Sexual reproduction is more complicated • Sexual reproduction is the more common method • Genes enter the picture • Sexual reproduction is a safety mechanism • Lesson Review

Laboratory Activity
How Fast Does Yeast Reproduce Asexually? 212
The Human Reproductive Process 215
Human beings reproduce only sexually • The male system produces sperm • The female system has three functions • The ovaries produce eggs and estrogen • Other organs aid the reproductive process • The female has a menstrual cycle • Lesson Review

Growth, Birth, and Early Development 220
The embryo stage lasts two months • The fetus develops into a baby • Labor causes birth • What are the needs of a newborn baby? • Lesson Review
Applying What You Have Learned 225

W. Smallwood, *Challenges to Science: Life Science*, McGraw-Hill, at ix (1978).

The films subsequently complained about had been shown for a number of years previous to the 78-79 school year. There is evidence in the record that in relation to various aspects of teaching human reproduction, Stachura had consulted with and secured the approval of his teaching methods and instructions from the Principal who was his superior officer in the school system. It appears, however, that when public protest arose neither the administrative officials of the school nor the School Board itself saw fit to defend the embattled teacher, or publicly to assume responsibility for their own decisions.

The meeting of the School Board on April 23, 1979 occurred after Stachura showed two films in his Life Science class. These films had been provided by the County Health Department and were shown pursuant to the direction of the School Principal. They were entitled "From Boy to Man" and "From Girl to Woman." They were shown separately to boys and girls and parental permission slips were required for viewing the films. They had been shown before to other seventh grade classes. Subsequent, however, to this showing, community discussion and protest proliferated leading the School Superintendent to warn Stachura that he was in "a heck of a lot of trouble" and to advise him to stay away from the scheduled April 23, 1979 School Board meeting to avoid the "angry hotheads." After Ms. Truszkowski read a statement to the Board, there were calls to tar and feather Stachura. A member of the board described the meeting as follows:

> "At this time, the public was in total uproar and completely out of control. Two board members asked Mr. Kubisch to close meeting [sic], but did not to the best of my knowledge. One of the members of the public asked Mr. Kubisch what would you do if your child was in that class and he replied I wouldn't let my child go to that class. That put the meeting over the edge. People were hollering and shouting and the statement was made from the public that if Mr. Stachura was allowed to return to school in the morning, they would be there and picket the school. At this point of total panic, Mr. Russell stated in order to maintain peace in our school district, we would suspend Mr. Stachura with full pay and get this mess straightened out."
> (App. 586-87.)

On April 24, 1979, Stachura was suspended by Superintendent Russell from the classroom and told that he would "never see the inside of a Memphis classroom again." Stachura's suspension pending "administration evaluation" was confirmed by the Board on May 21, 1979. Stachura engaged counsel who, on May 22, 1979, made representations to the Board regarding the allegations and his suspension. Stachura's counsel objected to the appointment of a committee of parents to investigate their own complaints, to the lack of any actual investigation or opportunity to respond to the allegations, to the lack of notice or guidelines regarding teaching methods which the Board alleged were improper and to the lack of any notice or hearing on the allegations prior to his summary suspension. The Board did not respond to the May 22, 1979 letter. On May 29, 1979, Superintendent Russell handed Stachura a "letter of reprimand," dated April 20, 1979, which was based on Truszkowski's unsubstantiated allegations. Stachura's counsel responded with a second letter dated May 31, 1979 reiterating Stachura's position and his request for immediate reinstatement to the classroom and removal of the "reprimand letter" from his personnel file. On

June 4, 1979, the Board's attorneys responded by letter referring Stachura's attorney to an article in the Detroit Free Press for a statement of the Board's position on the matter. The Board subsequently informed Stachura that his rights under the contract would not be restored unless he accepted the "letter of reprimand."

We believe that Judge Harvey properly submitted to the jury the issues which were occasioned by the public attacks upon this teacher and by the letter of reprimand. We also hold that there was ample proof of actual injury to plaintiff Stachura both in his effective discharge by the Memphis Community School District and by the damage to his reputation and to his professional career as a teacher. Contrary to the situation in *Carey* v. *Piphus*, 435 U.S. 247 (1978), relied on by appellant School District, there was proof from which the jury could have found, as it did, actual and important damages.

Turning directly to the appellate issues in Stachura's suit against the School District defendants, we hold, as indicated above, that plaintiff Stachura's First Amendment rights were infringed and that his exercise of "academic freedom" had followed rather than violated his superior's instructions. *See Mailloux* v. *Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) and *Fern* v. *Thorp Public School*, 532 F.2d 1120 (7th Cir. 1976). We also agree with the District Judge and the jury that Stachura's property interests were invaded by his being effectively discharged. We likewise agree that the actions of the School Board "imposed a stigma on Stachura and foreclosed a definite range of employment opportunities" which plaintiff would otherwise have available. *See Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Defendants' claims based on *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir. 1983) are similarly without force. The holding in *Parratt* that the provision of post-deprivation remedies by state courts will, in some cases, suffice to provide all of the

process due in property deprivation claims applies only where, as in *Parratt*, 451 U.S. at 540-542, a pre-deprivation hearing was "impracticable" or "impossible." Here a pretermination due process hearing was both practical and feasible. *Loudermill* v. *Cleveland Board of Education*, 721 F.2d 550, 562 (6th Cir. 1983), *aff'd*, 105 S. Ct. 1487 (1985). The facts recited above also indicate clearly that Stachura was never given a fair opportunity to present his defense to the School Board nor do we believe that the Board's action can be held as a matter of law to have been taken in good faith.

From the point of view of this appellate court, our most substantial concern has been whether we should exercise the limited authority appellate courts have to enter a remittitur of the substantial damages awarded by this jury. Stachura suffered the embarrassment of extensive publicity in the local media which repeated the allegations against him, which included that he was a "sex maniac." Media coverage went around the world as the story was picked up by Stars and Stripes. Esquire magazine noted the event in its Dubious Achievement Awards. He and his family suffered the harassment of crank phone calls and refuse left on their porch, which continued up through the time of the trial three years after the events. He testified that the tension and pressure resulted in nightmares and sleepless nights and forced him to sleep on the living room floor so as not to disturb his wife. He became very withdrawn from friends and neighbors. Substantial as are the jury awards, it is clear to us that the damages that Stachura suffered will affect his professional career for his entire lifetime. While some may accept his vindication in court, there may still be many doors closed to him in his future which otherwise would have been open.

For these reasons and others spelled out in the Memorandum Opinion and Order of District Judge James Harvey, dated April 11, 1983, the judgments appealed from are hereby affirmed.

OPPOSITION

BRIEF

85-410

No. _____

Supreme Court, U.S.
FILED
SEP 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, et al.,
Petitioners,

vs.

EDWARD J. STACHURA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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No. _____

In The

Supreme Court of the United States

October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, et al.,
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vs.

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Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

Petitioners' Statement of the Case neglects to mention that the jury found, upon Special Interrogatories (Respondent's Appendix, pp 11-13), that Respondent Stachura was not only deprived of property interests but of First Amendment rights and liberty interests without due process of law. The award of damages against each Petitioner did not apportion such damages among the various found bases of liability; Petitioners at no time requested such apportionment[1] and are in no position

[1] At trial, counsel claimed instead:

> "The Court's instruction . . . I believe, asks the jury to speculate as to the value of the Constitutional right. I believe the Court in *Carey* v *Piphus*, 453 US 247, indicated nominal damages were an appropriate measure of the deprivation of, at least in that case, a First Amendment right unless there

(*continued on following page*)

to seek it here. Cf. *New York, Lake Erie & Western Railroad Co* v *Estill*, 147 US 591, 614 (1983). Abandoning claims made below,[2] Petitioners now object that the jury was erroneously instructed on the question of damages for deprivation of procedural due process. It is difficult to see how this contention, even if availing, establishes prejudicial error, *Palmer* v *Hoffman*, 318 US 109, 116 (1943), since the evidence amply supports the totality of the damages awarded for Petitioners' entire course of conduct and its impact upon Respondent.

Petitioners' contention that the jury erroneously concluded that Stachura was deprived of a property right is belied by the record to which we advert in Point II.

Accordingly, we oppose the Petition since this case presents no basis under Rule 17 for hearing by this Court.

(*continued from preceding page*)

> was a showing of actual damages. It seems to me that the Court's instruction . . . asks the jury to speculate as to what the value of the Constitutional right is. I don't think that's appropriate under the decision of the Supreme Court, and we object to the giving of that instruction." (R. 1440)

[2] Petitioners' third question presented here is "Whether the Court of Appeals erred in affirming the decision of the District Court." This seems so comprehensive as to be meaningless. It is not dealt with in any way in the body of the petition and in view of Rule 21.5, we believe it requires no response. See *McNeal* v *Culver*, 365 US 109, 117 (1961); *New Haven Inclusion Cases*, 399 US 392, 481 n 78 (1970).

ARGUMENT

I.

THE JURY WAS PROPERLY INSTRUCTED AS TO DAMAGES RECOVERABLE BY RESPONDENT AND APPROVAL OF THOSE INSTRUCTIONS BY THE COURT OF APPEALS IS IN NOWISE INCONSISTENT WITH RULINGS OF THIS COURT.

Petitioners seek to characterize the deprivation of Respondent's liberty and property interests as "procedural" merely, and then misapprehend and misapply the holding of *Carey* v *Piphus*, 435 US 247 (1978). Piphus, a high school freshman, was caught by his principal smoking marijuana on school grounds and was immediately suspended from school for 20 days. He did not dispute his "guilt" nor the propriety of his punishment but argued that a more formal procedure should have preceded his suspension. Although violation of procedural due process was established, this Court held that such fact alone did not justify an award of substantial damages since a "substantively justified" deprivation, rather than deficient procedures, may account for claimed distress (435 US at 263). Where the deprivation of a liberty or property interest is "substantively justified," a substantial recovery must necessarily rest on a demonstration of actual compensable damages caused by the procedural infirmities challenged.

In the case at bar there was no "ambiguity of causation" such as the Court found decisive in *Piphus*. From opening statement, throughout trial, and in closing argument, Respondent insisted he was innocent of *any* wrongdoing. He contended that the accusations made against him by members of the community that he had abused his teaching role were without foundation; that he was improperly removed from the classroom and without justification; that his reputation was besmirched

and his career opportunities substantially narrowed by the deliberate and stigmatizing acts of Petitioners. Though challenged by Petitioners, the verdict confirmed these contentions.

The damages actually suffered by Respondent as a direct consequence of Petitioners' acts were detailed before the jury. It found them to be substantial and two reviewing courts have not disagreed. Petitioners merely rephrase arguments previously made and rejected to avoid the unmistakeable conclusion that their callous disregard of Respondent's rights proximately caused substantial actual damages. *Carey* has no relevance to the deprivation of substantive constitutional rights. See *Konczak* v *Tyrrell*, 603 F2d 13, 17 (7th Cir, 1979), cert den, 444 US 1016 (1980); *Owen* v *Lash*, 682 F2d 648, 653 (7th Cir, 1982); *Brandon* v *Allen*, 719 F2d 151, 154-5 (6th Cir, 1983); *Lenard* v *Argento*, 699 F2d 874, 889 (7th Cir, 1983); *Bell* v *Little Axe Independent School District No. 70*, 766 F2d 1391, 1408-12 (10th Cir, 1985); *Bergman* v *United States*, 579 F Supp 911, 934 (WD Mich, 1984).

Petitioners object to an instruction adapted from what was expressly approved in *Herrera* v *Valentine*, 653 F2d 1220 (8th Cir, 1981) and *Corriz* v *Naranjo*, 667 F2d 892 (10th Cir, 1981), cert granted, 456 US 971, cert dism., 458 US 1123 (1982). After cautioning the jury that it was not to award speculative damages and pointing out that the object of any damage recovery was to place the plaintiff "in the same position he would be in if his civil rights had not been violated" (R. 1412-13), Judge Harvey indicated that if the plaintiff were found to have been deprived of a constitutional right, the jury could award "damages to compensate him for the deprivation" and that since the value of such deprivation was difficult to measure, the jury could consider the importance of the right in our constitutional scheme and its "significance in the context

of the activities" in which Respondent was engaged when the violation took place (R. 1414-16). The instructions nowhere suggested that damages could be awarded for the "deprivation itself" but only that in measuring the damage from a constitutional deprivation, the "nature of the constitutional deprivation," *Smith* v *Heath*, 691 F2d 220, 226 (6th Cir, 1982), is a legitimate consideration. This seems a self-evident truism. Every day juries must seek to determine, under our governmental system and social structure, the value to be attributed to loss of an arm or a leg or an eye or an ear, as distinct from how such loss may be viewed in other national cultures. The significance of bodily integrity attributed by our institutions and mores is the indispensable predicate, however inarticulate, to every translation of loss of such integrity into a monetary award. Unless deprivations of the right to religious liberty, academic freedom, associational protections or other intangible constitutional guarantees are to be ignored and all monetary redress for their loss excluded, the deprivation is measurable only in terms of the nature and extent of what is being denied. Certainly, nothing in *Carey* forecloses awards for injuries to fundamental rights secured by the Constitution simply because they are not reflected in medical bills, as the thoughtful analysis in *Bell* v *Little Axe Independent School District No. 70*, 766 F2d 1391, 1408-1413 (10th Cir, 1985), makes clear.

Doe v *District of Columbia*, 697 F2d 1115 (DC Cir, 1983), invoked by Petitioners, does not declare otherwise nor does it conflict with the instructions given by Judge Harvey and found unobjectionable by the Court of Appeals. An award in a class action brought by inmates under the Eighth Amendment for alleged cruel and unusual penal conditions was there reversed on a

number of grounds. Among them were uncertainty and ambiguity in instructions which appeared to authorize recovery for (i) physical injuries, (ii) mental distress and (iii) "the intrinsic value of their constitutional rights — evaluated 'upon consideration of equity, reason and pragmatism.'" Particularly because the precise contours of the right to be free from cruel and unusual punishment in a penal institution were so debatable — as the separate statements of Judges MacKinnon and Edwards demonstrate, *Doe* v *District of Columbia*, 701 F2d 948 (DC Cir, 1983), the invitation to a lay jury to award damages based upon its notions of "equity, reason and pragmatism" seems clearly inappropriate. But no such invitation was given or permitted the jury here. *Doe* neither mentions nor casts doubt on *Corriz* or *Herrera*. Alleged "conflict" in Court of Appeals decisions is a contrived mirage which presents no occasion for grant of the writ.

II.

ON PROPER INSTRUCTIONS, THE JURY PROPERLY CONCLUDED THAT RESPONDENT WAS DEPRIVED OF A PROPERTY INTEREST WITHOUT DUE PROCESS OF LAW.

Surprisingly, Petitioners now claim that the verdict of the jury and the decisions of two courts below were based on some new "previously unrecognized" form of property protected by the Fourteenth Amendment. This forensic fantasy is plainly belied by the record.

Respondent Stachura was a tenured teacher protected against arbitrary discharge or demotion by the Michigan Teachers Tenure Act, MCL 38.71, et seq. The collective bargaining agreement covering his employment provided that "no teacher shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any

professional advantage without just cause." The jury was informed that the parties were in dispute as to whether or not Stachura was actually discharged; "that a teacher is not 'discharged' unless he is fully terminated from employment, and is not 'demoted unless he suffers a loss of pay.'" Unless he was fully terminated, he was denied no property right by reason of the statute (R. 1403). He was deprived of a contractual property right only if the jury found the contract provision to have been violated (R. 1404). No objection was made to these instructions and the jury expressly concluded that Stachura "was entitled to due process on the basis of a property interest previously defined in these instructions" (Resp. App., p 11).

Petitioners seek to reopen this question in this Court (Pet., p 11). This hardly seems an appropriate basis to clog this Court's docket, particularly since there was abundant basis for the jury's conclusion. On April 20, 1979, Respondent was given a "pink slip" indicating that he was "laid off" and not assured of any employment in the Memphis School District during the 1979-1980 school year (R. 273). On April 23 he was wrenched from his classes in the middle of the school year and summarily "suspended pending investigation." The superintendent of the school system told him to "resign" entirely rather than resist "indefinite" suspension (R. 2789). He was publicly branded unfit to teach by the President of the Memphis Board of Education (R. 787-8) and was told by the superintendent that he would "never see the inside of a Memphis classroom again" (R. 278). Even after he received a formal "reprimand," he was told that "there was no way" he would be restored to his classroom (R. 329).

Following his suspension, his attorney repeatedly and vainly sought to elicit the alleged grounds for such per-

emptory action (R. 144, 149). Fully two months after he was evicted from the classroom — during which time he was kept ignorant of his employment status — he was referred for answer by Petitioners to the lurid accusations against him from Petitioners and others in a metropolitan newspaper article of May 27 (R. 151). Later, Stachura received formal notification that his "suspension" was being continued "pending investigation" (R. 125) — a crass and cruel hoax, like the "teasing illusion" described by Mr. Justice Jackson in *Edwards* v *California*, 314 US 160, 186 (1941), for there was no investigation whatsoever.

Although Petitioners insisted that Respondent was merely "suspended" and not fired, they did not explain how his dismissal from the classroom was other than permanent and irrevocable, cf. *Radio Officers Union* v *NLRB*, 347 US 17, 49, 51 (1954) and the jury certainly had the right "to infer the motive is one that the employer desires to conceal." *Shattuck Denn Mining Corp* v *NLRB*, 362 F2d 466, 470 (9th Cir, 1966). The jurors were properly instructed to consider both direct and circumstantial evidence (R. 1372) and told that they need not blind themselves to the lessons of common experience (R. 1373-4). They obviously took into consideration all relevant facts in concluding that Stachura was entitled to due process based upon his property interest and that he was deprived of due process by Petitioners (Resp. App., p 11).

The jury verdict forecloses Petitioners' speculations as to whether Stachura was "constructively discharged" or "constructively discharged" or merely consigned to perpetual limbo. The plain fact is that it was only the commencement of this action and the impending threat of injunctive relief which drove Petitioners to agree on August 20, 1979 that "Stachura be forthwith reinstated as

a tenured classroom teacher in the Memphis Community School District" in a consent order entered by the trial court without waiver of any claims or defenses of any party (R. 3).

CONCLUSION

This case presents no novel issues of law justifying review by this Court. It is distinguished only by the persistent indifference of Petitioners to rudimentary requirements of fairness, by the grossness of their misconduct, and by the disastrous radiations of their actions upon the well-being of Respondent and his family. Judge Harvey's conduct of the trial was unexceptionable and Petitioners had ample opportunity to voice their views and seek to justify their position. Those claims were resoundingly rejected by the jury. Petitioners raised their contentions anew before the Court of Appeals which unanimously failed to see any merit in them. Recast here, those contentions remain without merit and do not justify perpetuation of this litigation. We respectfully urge denial of the writ.

Respectfully submitted,

LEVIN, LEVIN, GARVETT AND DILL

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DATED: September 26, 1985.

RESPONDENT'S APPENDIX

• • •

JURY FINDINGS
UPON SPECIAL INTERROGATORIES

• • •

THE COURT: The Court will ask the clerk to read aloud the verdict.

CLERK FOSTER: In the case of Edward Stachura, et al, versus Memphis Community School District, et al, part I: Plaintiff Stachura's First Amendment Claim, question 1: Do you find that Plaintiff Edward Stachura's First Amendment rights, as previously defined in these instructions, were violated by any or all of the Defendants?

Answer: Yes.

Question 2: If your answer to question 1 was yes, which Defendants do you find violated Plaintiff Edward Stachura's First Amendment rights?

Those indicated are as follows: The School Board, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Beatrice Dolan, Donald Russell, Delores Truszkowski.

Part II: Plaintiff Stachura's Due Process Claim. Question 3: Do you find that Plaintiff Edward Stachura was entitled to due process on the basis of a property interest as previously defined in these instructions?

Answer: Yes.

Question 4: Do you find that Plaintiff Edward Stachura was entitled to due process on the basis of a liberty interest as previously defined in these instructions?

The answer is yes.

Question 5: Do you find that Plaintiff Edward Stachura was deprived of due process by the Defendants?

Answer: Yes.

Question 6: If your answer to question 5 was yes, which Defendants do you find were responsible for depriving Plaintiff Edward Stachura of his right to due process?

Those indicated are as follows: The School Board, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Beatrice Dolan, Donald Russell and Delores Truszkowski.

Part III: Plaintiff McDonald's First Amendment Claim. Question 7: Do you find that Plaintiff James McDonald's First Amendment rights, as previously defined in these instructions, were violated by any or all of the Defendants?

The answer is no.

Part IV: Damages. What is the amount of nominal or compensatory damages which you award Plaintiff Edward Stachura for the deprivation of his rights under 42 USC 1983?

As to the School Board, the amount indicated in compensatory damages if [sic] $233,750.

Mr. Herbert Kubisch, as to compensatory damages, $8,250.

As to Genevieve Walters, the compensatory damages is $2,750.

As to Margaret Guoin for compensatory damages, $2,750.

For Timothy Kelley as to compensatory damages, $2,750.

As to Mr. Ernest Beaudrie, $2,750.

As to Beatrice Dolan, $2,750.

As to Donald Russell, $8,250.

As to Delores Truszkowski, $8,250.

Question 10: What is the amount of punitive damages which you award Plaintiff Edward Stachura for the deprivation of his rights under 42 USC 1983?

For punitive damages as to Herbert Kubisch, $15,000.

As to Genevieve Walters, $1,000.

As to Margaret Guoin, $1,000.

As to Timothy Kelley, $1,000.

As to Lawrence Delekta, $1,000.

As to Ernest Beaudrie, $1,000.

As to Beatrice Dolan, $1,000.

As to Donald Russell, $10,000.

As to Delores Truszkowski, $10,000.

Signed Charles C. Bailey, Foreperson.

JOINT

APPENDIX

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-410

In the Supreme Court of the United States

October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, et al,
Petitioners,

v.

EDWARD J. STACHURA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 30, 1985
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

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v.

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Respondent.

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Memorandum Opinion and Order of the United States District Court, Eastern District of Michigan, dated April 11, 1983 ..... B-1
Judgment Notwithstanding the Verdict of the United States District Court, Eastern District of Michigan, dated April 11, 1983 ..... B-11
Opinion of the United States Court of Appeals for the Sixth Circuit, filed June 3, 1985 ..... C-1

Chronological List of Relevant Docket Entries

July 13, 1979 — Plaintiffs' Complaint filed in U.S. District Court for the Eastern District of Michigan, Southern Division

July 13, 1979 — Plaintiffs' file Motion for Preliminary Injunction with Memorandum

July 24, 1979 — Notice of Hearing on Motion for Preliminary Injunction set for July 30, 1979 at 2:30 p.m.

July 30, 1979 — Status conference held; Motion for Preliminary Injunction to be resolved by the parties. Guy, J.

August 9, 1979 — Defendants' Answer filed

August 21, 1979 — Consent Order Entered

January 8, 1980 — Order allowing Plaintiff to file an Amended Complaint entered; Plaintiffs' file Amended Complaint adding Defendants Patrick Dishinger and Delores Truszkowski

November 11, 1980 — Defendants substitution of Counsel

January 23, 1981 — Order allowing Defendants to file an Amended Answer entered

February 6, 1981 — Defendants' First Amended Answer filed

February 28, 1981 — Stipulation and Order of Discontinuance as to Defendant Dishinger

June 4, 1981 — Jury selection and trial commenced

June 28, 1982 — Court instructs jury and jury begins deliberations

June 30, 1982 — Jury returns $321,000. verdict for Plaintiff Stachura against Defendants Board of Education, Kubisch, Walters, Guoin, Kelley, Delekta, Beaudrie, Dolan, Russell and Truszkowski

July 6, 1982 — Judgment entered

July 19, 1982 — Court Orders enlargement of time for filing motions for New Trial/Judgment Notwithstanding the Verdict

July 26, 1982 — Defendant Truszkowski moves for New Trial/Judgment Notwithstanding the Verdict; Defendants move for New Trial/Judgment Notwithstanding the Verdict

August 6, 1982 — Defendants file Notice of Appeal

April 11, 1982 — Memorandum and Order granting Defendant Truszkowski's Motion for Judgment Notwithstanding the Verdict and denying all other Defendants' Motion for New Trial/Judgment Notwithstanding the Verdict

May 10, 1983 — Plaintiff files Notice of Appeal (as to Defendant Truszkowski)

May 11, 1983 — Defendants file Notice of Appeal

June 3, 1985 — Judgment and Opinion of Court of Appeals

August 30, 1985 — Petitioners file Petition for Certiorari

October 21, 1985 — Writ of Certiorari granted to Issues I and III presented by the Petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. STACHURA and JAMES DAVID McDONALD, by his next friend, JANET E. MELTON,
Plaintiffs,

v. Case No.

MEMPHIS COMMUNITY SCHOOL DISTRICT, a public body, BOARD OF EDUCATION OF THE MEMPHIS COMMUNITY SCHOOLS, HERBERT KUBICH [SIC], GENEVIEVE WALTERS, MARGARET GUCIN, TIMOTHY KELLEY, LAWRENCE DELEKTA, ERNEST BEAUDRIE, BEATRICE [SIC] DOLAN, MARILYN MOORE, DONALD C. RUSSELL, ROBERT PHILLIPS, CHARLES BECKER, AND JOHN DOE AND MARY ROE,
Defendants.

COMPLAINT

EDWARD J. STACHURA and JAMES DAVID McDONALD, by his next friend, JANET E. MELTON, Plaintiffs herein, by their attorneys, LEVIN, LEVIN, GARVETT and DILL, complain as follows:

JURISDICTION

1. Jurisdiction of this Court is predicated upon the First and Fourteenth Amendments to the United States Constitution, 28 USC §1331 and §1343, 42 USC §1983, 1985 and 1986.

PARTIES

2. Plaintiff Edward J. Stachura is a resident of the City of Richmond, St. Clair County, Michigan. Since the Fall of 1977, he was employed by the Memphis Community School District and its Board of Education, as a duly licensed classroom instructor at the Memphis Middle School, located in Memphis, Michigan. Plaintiff is a tenured teacher within the meaning of MCL §38.71 et seq, MSA §15.1971 and is under contract pursuant to MCLA §380.1231, MSA §15.41231.

3. Plaintiff James David McDonald is a minor who attends the Memphis Middle School and was a student in a Life Science class taught by Plaintiff Stachura. He appears herein by his mother and next friend, Janet E. Melton.

4. Defendant Memphis Community School District is a fourth class public school district located in the City of Memphis, St. Clair County, Michigan, organized and established pursuant to the laws of the State of Michigan, particularly MCLA 380.101 et seq; MSA 15.4101 et. seq.

5. Defendant Board of Education of the Memphis Community School District (Defendant Board) is the governing body authorized by law to operate Defendant District.

6. Defendants Herbert Kubich [sic], Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie and Beatrice [sic] Dolan (Defendant Board Members) are the duly elected and acting members of Defendant Board. Defendant Kubich [sic] is the president and chief spokeman [sic] for such Board. Effective July 1, 1979 Defendant Marilyn Moore assumed a seat on said Board upon the retirement of Defendant Kubich [sic].

7. Defendant Donald Russell, prior to May 29, 1979, was employed by Defendant Board as the Superintendent of Schools, being the chief administrative officer of such school system.

8. Defendant Robert Phillips has been employed by Defendant Board for some years and is presently employed as the Acting Superintendent of Schools, being the chief administrative officer of such school system.

9. Defendant Charles Becker at all times relevant hereto was principal of the Memphis Middle School where Plaintiff Stachura was assigned as a classroom instructor.

10. Defendants John Doe and Mary Roe are persons who conspired and confederated with the named Defendan's in the course of the wrongful conduct hereinafter set forth. Their true identities will be duly indicated following pre-trial discovery proceedings.

11. Plaintiffs and all of the individual Defendants reside within the Eastern District of Michigan, Southern Division. All Defendants are sued individually and in their respective official capacities, jointly and severally.

BACKGROUND

12. Plaintiff Stachura holds a Bachelor of Science degree from Ferris State College, and has completed courses offered by Central Michigan University, Eastern Michigan University, Michigan State University, the University of Michigan and Kansas State University. He taught in Military Dependant schools in Japan for four years, and became an experienced science and mathematics teacher at high school, middle school and elementary school levels.

13. Plaintiff Stachura was hired to teach science and mathematics during the 1977–1978 school year at the Memphis Middle School, including a course in "Life Science" which deals with various structures and organs of the human body and also contained an extensive unit on human reproduction. At no time was Plaintiff advised by any Defendant concerning

matters to be included or excluded from such course of instruction, what questions of students germane to such course were to be left unanswered, or what teaching techniques were to be employed to engage the interest of students or to assist them in the mastery of course materials. Such matters were committed to the professional discretion and judgment of the Plaintiff. Plaintiff prepared daily lesson plans for such course during 1977-1978 which were at all times available for inspection. Defendants at no time sought to review, criticize or discuss Plaintiff's teaching methods or course subject matter, or to impose limitations upon Plaintiff's academic freedom.

14. Plaintiff Stachura competently and effectively taught the Life Science course during the 1977-1978 school year. He was awarded tenure and offered a contract to teach the same course, among others, for the 1978-1979 school year. When such contract was offered, no Defendant advised Plaintiff of any limitations upon his right to continue the teaching methods and techniques he had successfully utilized during the prior year. In accepting the contract, Plaintiff did not waive or surrender any of his constitutional rights to free expression and communication of ideas in his classroom.

15. In preparation for the teaching of such course, Plaintiff Stachura reviewed a number of well-known texts and recommended a text published by McGraw-Hill, written by William L. Smallwood, entitled *Challenges to Life Science*. This text was approved by Defendants Russell, Becker and members of the School Board and was procured by the Board for use in the Life Science classes assigned to said Plaintiff.

16. This textbook contained a chapter entitled "Human Reproduction" which Plaintiff Stachura used in teaching the unit on human reproduction in the course assigned to him. Once again, neither the Board nor any other Defendant advised Plaintiff of any limitations on discussion of the subject matter of such chapter and unit, or of the method or manner of

teaching this unit, topics or materials to be excluded, or questions of students to be answered or rejected. Plaintiff again prepared daily lesson plans for this unit which were available for inspection by school authorities. All defendants failed to review, criticize or discuss the nature of this unit with Plaintiff in any way. At no time was Plaintiff advised nor did he have any reasonable grounds to believe that his teaching methods, conduct in the classroom or expressions or utterances to students were proscribed or prohibited.

17. At a special public meeting of the school board on April 23, 1979, various members of the public, including Defendants Marilyn Moore, John Doe and Mary Roe, appeared at the meeting and made accusations solely on the basis of hearsay reports, gossip and rumor, against Plaintiff Stachura, his professional competence and reputation and his conduct in teaching the life science course. Without investigation as to the truth or falsity of such accusations, defendant Board members, individually and collectively, accepted them as gospel and allied themselves with the most vituperative, defamatory, false and groundless accusations, giving deliberate and malicious public endorsement to charges that Plaintiff Stachura:

(a) Was incompetent to practice his profession as a teacher;

(b) Was a "sex maniac" intent upon corrupting the morals of youth of the community;

(c) Had drawn obscene pictures on the classroom blackboard;

(d) Sought to encourage sexual promiscuity among students;

(e) Sought to introduce to St. Clair County alien sexual notions and customs from Japan;

(f) Was guilty of criminal conduct in his teaching procedures.

Defendant Kubich [sic], the Board president, publicly concluded that "I wouldn't let my kid go to that ("Plaintiff Stachura's) class". At no time did any member of the Board disassociate himself or herself from the foregoing accusations and innuendoes.

18. Without any further investigation or verification, on the following morning, April 24, 1979 Defendant Russell removed Plaintiff Stachura from the classroom, and directed him not to return to perform his contractual duties as a teacher. Such action was with the consent of Defendant Board members who unanimously confirmed the suspension and terminated Stachura's employment. Although Defendants purported to give Plaintiff Stachura a "pink slip" or indefinite layoff for alleged lack of work, such claim was pretextual only; Plaintiff's loss of permanent and uninterrupted employment in the Memphis schools was punitive merely for the purpose of depriving him and his students of their constitutionally-protected rights.

19. Thereafter Defendants, acting in careless, wanton and malicious disregard of Plaintiff's rights, and in disregard of their official duties and responsibilities, confirmed and aggravated the groundless and malicious accusations set forth in paragraph 18 hereof by repeating and circulating them to the public throughout Michigan, the United States and foreign countries. The sensationalist character of such statements assured their wide dissemination in the press, radio and television media. Allegations made by Defendants were typically reported in a two-page feature story in the Detroit Free Press on Sunday, May 27, 1979, a copy of which is annexed and incorporated as Exhibit A.

20. On May 22, 1979, counsel in behalf of Stachura wrote a letter to Defendant Board advising them that the accusations against Plaintiff were false, and demanding rescission of actions against him. Defendant Board members not only failed to respond to such letter but, with full knowledge thereof, deliberately and maliciously confirmed and recirculated the false charges against Stachura, as evidenced by Exhibit A.

21. More than a month after his termination from the Memphis Middle School, Plaintiff Stachura received on May 29, 1979 a document signed by Defendant Becker bearing the date of April 20, 1979, which purported to give reasons for the action taken against him. Such document, manifestly prepared after the fact, was denominated a "letter of reprimand". Either such letter was deliberately contrived by said Defendant out of personal malice and vindictiveness or was undertaken with the full consent of Defendant Russell, who delivered it to Plaintiff Stachura, and the individual members of Defendant Board. A copy of such document is incorporated and annexed as Exhibit B. The charges, accusations and innuendoes made therein are false, reckless and malicious, and were deliberately designed to damage and injure Plaintiff Stachura in his professional and personal capacity, and to stigmatize him as an unfit member of the community.

22. Under date of May 31, counsel for Plaintiff Stachura again demanded that the Board reinstate Stachura to his former position, clear his record and publicly announce his vindication. A copy of such letter is incorporated and annexed as Exhibit C. In response, Defendants caused their attorney to re-echo or endorse the false, defamatory and groundless accusations recited in the story in the Detroit Free Press, Exhibit A. Such appeal to "adjudication by newspaper", which is incorporated and annexed as Exhibit D, further compounds the maliciousness of Defendants' course of action and inaction.

23. Immediately upon the suspension and termination of Stachura from duty at the Memphis Middle School, numerous of his students, including Plaintiff McDonald, voluntarily and on their own initiative circulated a petition to have Stachura reinstated as their teacher and to permit him to continue to instruct them in the Life Science course during the 1978-1979 school year. This petition was duly presented to Defendant Becker who advised the students that the matter was "out of his hands" and that he could do nothing to assure the continuity of classroom instruction which they desired.

COUNT I

24. The allegations of paragraphs 1 through 23 are incorporated by reference.

25. Plaintiff Stachura, as an American citizen, did not surrender his rights, privileges and immunities under the United States Constitution as a condition of employment in the Memphis school district. The Constitution, including the First and Fourteenth Amendments thereof, confirm his right as a public school teacher to "academic freedom" in the classroom, which right includes the right conscientiously to teach a curriculum duly assigned to him in a manner dictated by his professional training, experience and good judgment.

26. At all times Plaintiff Stachura faithfully taught the curriculum prescribed by Defendant Board and defined in the textbook which it selected and approved. At no time did Stachura act in defiance of any prescribed curriculum or instructions from the Board or the administration of the Memphis Public Schools. His teaching was designed to provoke the interest of his students, to assist them in mastering the materials and subject-matter of the course, and to foster a spirit of free inquiry in the "marketplace of ideas".

27. The contours of the Life Science course were defined by the textbook which Defendant school board freely and deliberately procured for use in the classroom, *Challenges to Life Science*. Students were enrolled in that course and Plaintiff Stachura was directed to teach it in accordance with such course contours. Consistent with the First Amendment, Defendants had no authority to censor Plaintiff Stachura's teaching within such course contours or arbitrarily to withdraw portions of the course subject-matter simply because of objections received from some parent or non-parent within the community. Such action befouled the "marketplace of ideas" in the classroom which the First Amendment guarantees.

28. The ouster of Plaintiff Stachura from the classroom, by Defendants Kubich [sic], Walters, Guoin, Kelley, Delekta, Beaudrie, Dolan, Russell and Becker, on the basis of unexamined and uncorroborated rumors, without notice of any charges or opportunity to be heard, was a deliberate violation by public authority of Plaintiff Stachura'a constitutionally-protected rights of freedom of speech and expression and freedom of conscience and association.

29. The irresponsible affiliation of said Defendants with all such rumors and accusations, prior to any investigation and determination on evidence, established a deliberate, careless and malicious course designed to compound the injury to the teacher's standing in the community and in his profession.

30. The subsequent effort of Defendants *ex post facto*, to rationalize this course of action, while giving repeated widespread public circulation to unproved, false and defamatory charges confirmed such malice and compounded Plaintiff's attendant injury.

31. There is presently a surplus of teachers in Michigan and employment opportunities are limited. The wrongful acts

of Defendants have imposed a "badge of infamy" upon Plaintiff Stachura and sharply reduced the possibility of his employment in any school district within or even outside the State. His wrongful termination in the circumstances above set forth constitutes a continued threat to his professional career for which he carefully trained and prepared, his good reputation and standing in the community, and the economic wellbeing of himself and family. He has been wrongfully stigmatized as an unreliable and dangerous instructor of youth and this stigma will continue to aggravate and intensify unless corrected by this Court.

32. The deliberate, reckless and malicious acts of Defendants, and each of them, require the award of punitive or exemplary damages in addition to compensatory damages to which Plaintiff may be entitled. Defendants acted deliberately, arbitrarily, maliciously and in bad faith in depriving Plaintiff of his rights, privileges and immunities guaranteed by the United States Constitution. Defendants well knew that the effect of their action would be to deprive Plaintiff of an opportunity to pursue a livelihood in his chosen profession.

33. Plaintiff Stachura has further been obligated to retain the undersigned counsel to prosecute this action. Pursuant to 42 USC 1988, reasonable attorneys' fees should be allowed.

WHEREFORE, Plaintiff Stachura prays that this Court enter judgment against Defendants and in favor of Plaintiff as follows:

A. Issue a temporary and permanent injunction against Defendant Board and Defendant District, the present and former members of said Board, and their agents and employees restraining them from continuing breach of Plaintiff's contract of employment as a Memphis teacher; refusing to reinstate Plaintiff to his position at the Memphis Middle School; imposing retrospective conditions upon his teaching, the subject matter of the Life Science course or

Stachura's conduct of classroom activities; and directing removal of all reference in Plaintiff's personnel file to any reprimand, suspension, termination or reference to the incident which is the basis for this suit;

B. Award compensatory damages in favor of Plaintiff Stachura and against Defendants Kubich [sic], Walters, Guoin, Kelley, Delekta, Beaudrie, Dolan, Moore, Russel, Phillips and Becker, jointly and severally, in their personal and representative capacities, in the amount of $500,000.00;

C. Award punitive damages in favor of Plaintiff Stachura and against said Defendants, jointly and severally, in their personal and representative capacities, in the amount of $500,000;

D. Award Plaintiff Stachura costs and attorneys' fees pursuant to 42 USC 1988.

COUNT II

34. The allegations of paragraphs 1 through 23 are incorporated herein by reference.

35. Plaintiff Stachura taught in the Memphis Middle School under a contract prescribed by the Michigan School Code. Plaintiff is a tenured teacher protected against discharge or demotion by the Michigan Tenure of Teachers Act. Plaintiff is likewise a member of a bargaining unit represented by the Memphis Education Association. Pursuant to a collective bargaining agreement entered into July 1, 1977 between the Board of Education of the School District of Memphis,

Michigan and the Memphis Education Association, as exclusive bargaining representative of teachers in said district, pursuant to Michigan's Public Employment Relations Act, it was provided in Article IX, paragraph D thereof:

> "No teacher shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause."

Plaintiff Stachura accordingly had a "property interest" in his employment, confirmed by state law and voluntary contracts and understandings with his employer, and protected against arbitrary impairment or deprivation by the Fourteenth Amendment to the Constitution.

36. Plaintiff Stachura likewise had a "liberty interest" as a public school teacher and citizen to be free from unfair damage to his professional standing and associations in the Memphis community caused by acts or omissions of public authority. He had a similar interest to be free from being stigmatized by public authority and foreclosed from taking advantage of employment opportunities in other school districts and from a range of opportunity for gainful employment. Such "liberty interests" are protected against arbitrary impairment or deprivation under the Fourteenth Amendment to the Constitution.

37. The allegations of paragraphs 24 through 33 are incorporated by reference.

38. The removal of Plaintiff Stachura from the classroom and continuing denial of employment to him by Defendants Kubich [sic], Walters, Guoin, Kelley, Delekta, Beaudrie, Dolan, Moore, Russell, Phillips and Becker were based on groundless rumors and hearsay evidence and without affording Plaintiff a hearing. In such circumstances, the deprivation of his "property" and "liberty" interests by Defendants was arbitrary and capricious and a violation of both substantive and procedural due process of law required by the Fourteenth Amendment.

WHEREFORE Plaintiff Stachura prays that this Court enter judgment against said Defendants and in favor of Plaintiff Stachura as follows:

A. Issue a temporary and permanent injunction against Defendant Board and Defendant District and the present and former members of said Board, and their agents and employees, restraining them from continuing breach of Plaintiff's contract of employment as a Memphis teacher; refusing to reinstate Plaintiff to his position at the Memphis Middle School; imposing retrospective conditions upon his teaching, the subject-matter of the Life Science course or Stachura's conduct of classroom activities; and directing removal of all reference in Plaintiff's personnel file to any reprimand, suspension, termination or reference to the incident which is the basis for this suit;

B. Award compensatory damages in favor of Plaintiff Stachura and against Defendants Kubich [sic], Walters, Guoin, Kelley, Delekta, Beaudrie, Dolan, Moore, Phillips and Becker, jointly and severally, in their personal and representative capacities, in the amount of $500,000;

C. Award punitive damages in favor of Plaintiff Stachura and against said Defendants, jointly and severally, in their personal and representative capacities, in the amount of $500,000;

D. Award Plaintiff Stachura costs and attorneys' fees pursuant to 42 USC §1988.

COUNT III

39. The allegations of paragraphs 1 through 38 are incorporated herein by reference.

40. Defendants Russell, Becker, Moore and Phillips, Doe and Roe conspired and confederated with Defendants School District, School Board and the then members thereof, to bring about the wrongful course of conduct hereinabove set forth in Counts I and II hereof and to injure Plaintiff Stachura in his person and property, in violation of 42 USC §1985 and 42 USC 1986.

41. Said Defendants, by reason of said conspiracy, all acted under color of state law but in defiance of law, to cause damage to Plaintiff Stachura and to Plaintiff McDonald. All acted deliberately, wantonly and maliciously to cause such injury.

WHEREFORE Plaintiff Stachura prays that this Court enter judgment for him against said Defendants, jointly and severally, in the amount of $500,000 for compensatory damages, and in the amount of $500,000 for punitive damages.

COUNT IV

42. Plaintiff James David McDonald incorporates herein the allegations of paragraphs 1 through 11 hereof.

43. Plaintiff McDonald was a seventh grade student at the Memphis Middle School. During the spring semester of the 1978–1979 school year he was enrolled in a Life Science Class that dealt with human biology. His teacher was Plaintiff Stachura. Plaintiff McDonald and other students of the class expected that they would have the same teacher throughout the course, that they would have the right to study the textbook selected by Defendant Board, and that they would enjoy the right to react freely to the curriculum therein set forth, to ask questions about its subject matter and to obtain accurate and honest answers to such questions. Said Plaintiff and his

fellow students had a right to learn and to know in an atmosphere of academic freedom, to associate together in the classroom, to receive information and ideas and to express their own ideas. Such right is protected by the United States Constitution, including the First and Fourteenth Amendments thereof.

44. At no time during the study of the Human Reproduction unit or other materials in the Life Science class did Plaintiff Stachura deal with matters not included within or reasonably related to the subject matter of the textbook prescribed for study by the Board and the administration of the Memphis Public Schools.

45. Defendants had no right summarily to interrupt Plaintiff's schooling, to remove his teacher from the classroom and to disrupt the established curriculum, or retroactively to alter the contours of such course. The sudden removal of Plaintiff Stachura from the classroom without explanation or excuse had disturbed the intellectual climate of such class, discouraged the free exchange of ideas in the classroom and created a chilling effect upon Plaintiff McDonald, his fellow students and the entire school community.

46. In an effort to protect their academic rights, Plaintiff McDonald and other students spontaneously circulated a petition to have Stachura restored to the classroom, but without success. Plaintiffs have accordingly been given to understand that the educational values in their school are in continuous hostage to unsupported accusations and demands from community interests. The subordination of public education to mob rule constitutes a direct assault upon Plaintiff's constitutional rights.

WHEREFORE, Plaintiff McDonald, in his own behalf and in behalf of his fellow students at Memphis Middle School, prays that this Court enjoin, both temporarily and permanently, Defendant Board and Defendant District from

refusing to reinstate Plaintiff Stachura to his position as teacher of the Life Science class at the Memphis Middle School, and interfering with his right to teach and the rights of his students to learn in an atmosphere of academic freedom.

LEVIN, LEVIN, GARVETT AND DILL

By /s/

Erwin B. Ellmann (P13168)
Marshall W. Anstandig (P24033)
Attorneys for Plaintiffs
3000 Town Center, Suite 1800
Southfield, Michigan 48075
(313) 352-8200

Date: July 13, 1979

[Verification Omitted in Printing]

DEFENDANTS' ANSWER TO COMPLAINT
Filed August 8, 1979
[Caption Omitted in Printing]

NOW COME the above named Defendants, by and through their attorneys, Thomas & Delaney, and for their Answer to Complaint, respectfully show unto this Honorable Court as follows:

1. Answering paragraph one of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

2. Answering paragraph two of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

3. Answering paragraph three of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

4. Answering paragraph four of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

5. Answering paragraph five of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

6. Answering paragraph six of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

7. Answering paragraph seven of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

8. Answering paragraph eight of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

9. Answering paragraph nine of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

10. Answering paragraph ten of Plaintiffs' Complaint, your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

11. Answering paragraph 11 of Plaintiffs' Complaint, your Defendants neither admit nor deny the allegations contained therein as they pertain to Plaintiff, but as to the allegations pertaining to the individual Defendants, your Defendants admit the same.

12. Answering paragraph 12 of Plaintiffs' Complaint, your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

13. Answering paragraph 13 of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

14. Answering paragraph 14 of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

15. Answering paragraph 15 of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

16. Answering paragraph 16 of Plaintiffs' Complaint, your Defendants admit the allegations contained therein, except for that portion which states that at no time was Plaintiff advised nor did he have any reason to believe that his teaching methods, control in the classroom, or utterances to students were proscribed or prohibited, and as to that portion, your Defendants expressly deny the same.

17. Answering paragraph 17 of Plaintiffs' Complaint, your Defendants admit that on April 23, 1979, various members of the public appeared at the meeting and made accusations against the Plaintiff. As to the remaining portions of said paragraph, your Defendants deny the same. Answering paragraph 17 subparagraphs a through f, your Defendants answer as follows:

a. Your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

b. Your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

c. Your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

d. Your Defendant neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

e. Your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

f. Your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

18. Answering paragraph 18 of Plaintiffs' Complaint, your Defendants admit that Defendant Russell removed Plaintiff Stachura from the [classroom], but affirmatively state that he was not discharged, but was suspended pending the board's investigation of the allegations made against Plaintiff Stachura at the April 23, 1979 board meeting. Further answering said paragraph, your Defendants admit that Plaintiff Stachura was given a "pink slip", but affirmatively state that said "pink slip" was given under financial reasons and that the Plaintiff well knew that there was a millage election coming up in August and that if said millage passed, he would be given a contract to teach for the coming year. Further answering said paragraph, your Defendants deny the allegations contained therein.

19. Answering paragraph 19 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

20. Answering paragraph 20 of Plaintiffs' Complaint, your Defendants admit that they received a letter from Plaintiff's counsel. As to the remaining allegations, your Defendants deny the same.

21. Answering paragraph 21 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

22. Answering paragraph 22 of Plaintiffs' Complaint, your Defendants admit that they received the demand from Plaintiffs' counsel requesting them to reinstate him to his former position and to clear his record and publicly announce his vindication, but as to the remaining portions of said paragraph, your Defendants deny the same.

23. Answering paragraph 23 of Plaintiff's Complaint, your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

COUNT I

24. Answering paragraph 24 of Plaintiffs' Complaint, your Defendants reallege their answers to paragraphs 1 through 23 and incorporate the same [by] reference.

25. Answering paragraph 25 of Plaintiffs' Complaint, your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

26. Answering paragraph 26 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

27. Answering paragraph 27 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

28. Answering paragraph 28 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

29. Answering paragraph 29 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

30. Answering paragraph 30 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

31. Answering paragraph 31 of Plaintiffs' Complaint, your Defendants expressly deny said allegations and affirmatively state that if any "badge of infamy" has been imposed upon Plaintiff, then said Plaintiff brought the same upon himself.

32. Answering paragraph 32 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

33. Answering paragraph 33 of Plaintiffs' Complaint, your Defendants neither admit nor deny the allegations contained therein as to whether the Plaintiff had been obligated to retain counsel to prosecute this action. As to the remaining portions of said paragraph, your Defendants deny the same.

Further answering Count I of Plaintiffs' Complaint, which is Plaintiffs' prayer for relief, your Defendants deny that the Plaintiffs are entitled to the relief therein prayed or to any relief whatsoever and respectfully request that said Complaint be dismissed with costs taxed to Plaintiffs.

COUNT II

34. Answering paragraph 34 of Plaintiffs' Complaint, your Defendants reallege their answers to paragraphs 1 through 23, and incorporate the same by reference.

35. Answering paragraph 35 of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

36. Answering paragraph 36 of Plaintiffs' Complaint, your Defendants admit the allegations contained therein.

37. Answering paragraph 37 of Plaintiffs' Complaint, your Defendants reallege their answers to paragraphs 24 through 33 and incorporate the same by reference.

38. Answering paragraph 38 of Plaintiffs' Complaint, your Defendants deny that the Plaintiff was denied employment by the Defendants. Further answering said paragraph, your Defendants affirmatively state that Plaintiff was suspended pending an investigation of the various allegations made against him by members of the community and that prior to said investigation, there was no need for a hearing as he still had all of his rights under his contract, and that the Defendants did not deprive him of property and liberty, nor was the same arbitrary and capricious and in violation of both substantive and procedural due process of law

Further answering Count II of Plaintiffs' Complaint, your Defendants deny that the Plaintiffs are entitled to the relief therein prayed or to any relief whatsoever and respectfully request that said Complaint be dismissed with costs taxed to Plaintiffs.

COUNT III

39. Answering paragraph 39 of Plaintiffs' Complaint, your Defendants reallege their answers to paragraphs 1 through 38, and incorporate the same by reference.

40. Answering paragraph 40 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

41. Answering paragraph 41 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

Further answering said Count III which is Plaintiff's prayer for relief, your Defendants deny that the Plaintiff is entitled to

the relief therein prayed or to any relief whatsoever and respectfully request that said Complaint be dismissed with costs taxed to Plaintiff.

COUNT IV

42. Answering Count IV of Plaintiffs' Complaint, your Defendants reallege their answers to paragraphs 1 through 11 hereof, and incorporate the same be reference.

43. Answering paragraph 43 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

44. Answering paragraph 44 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

45. Answering paragraph 45 of Plaintiffs' Complaint, your Defendants deny the allegations contained therein.

46. Answering paragraph 46 of Plaintiffs' Complaint, your Defendants neither admit nor deny the allegations contained therein, having insufficient information on which to base an answer, but leave the Plaintiffs to their proofs.

Further answering said Count IV, which is Plaintiffs' prayer for relief, your Defendants deny that the Plaintiffs are entitled to the relief therein prayed or to any relief whatsoever and respectfully request that said Complaint be dismissed with costs taxed to Plaintiff.

/s/ JOSEPH H. DELANEY

Joseph H. Delaney
Attorney for Defendants

Dated: August 7, 1979

PLAINTIFFS' FIRST AMENDED COMPLAINT
Filed January 7, 1980
[Caption Omitted in Printing]

FIRST AMENDED COMPLAINT

In addition to the COMPLAINT previously filed in this cause, Plaintiffs EDWARD J. STACHURA and JAMES DAVID McDONALD, by his next friend, JANET E. MELTON, by their attorneys LEVIN, LEVIN, GARVETT and DILL, further allege as follows:

1. Paragraph 10 of the COMPLAINT shall be amended to read as follows:

10. Defendants Patrick Dishinger and Delores Truskowski are persons who conspired and confederated with other named Defendants in the course of the wrongful conduct hereinafter set forth.

2. The first sentence of Paragraph 17 of the COMPLAINT shall be amended to read as follows:

17. At a special public meeting of the school board on April 23, 1979, various members of the public, including Defendants Marilyn Moore, Patrick Dishinger and Delores Truskowski, appeared at the meeting and made accusations based solely on the basis of hearsay reports, gossip and rumor against Plaintiff Stachura, his professional competence and reputation and his conduct in teaching the Life Sciences course. Defendant Dishinger, without provocation incited the audience by publicly stating that Plaintiff Stachura should be "tarred and feathered and thrown out of town".

3. Paragraph 40 of the COMPLAINT shall be amended to read as follows:

40. Defendants Russell, Becker, Moore and Phillips, Dishinger and Truszkowski conspired and confederated with Defendant School Board and the members thereof, to bring about the wrongful course of conduct hereinabove set forth in Counts I and II hereof and to injure Plaintiff in his person and property, in violation of 42 USC§1985 and 42 USC§1986.

4. With the exception of the above amended paragraphs or portions of paragraphs all other provisions of the COMPLAINT, attached hereto, are hereby reaffirmed.

LEVIN, LEVIN, GARVETT AND DILL

Attorneys for Plaintiffs

By _____
Erwin B. Ellmann (P13168)

_____
David J. Houston (P30448)
3000 Town Center, Suite 1800
Southfield, Michigan 48075
(313) 352-8200

December 12, 1979

DEFENDANTS' FIRST AMENDED ANSWER
Filed May 6, 1981
[Caption Omitted in Printing]

FIRST AMENDED ANSWER

In addition to the Answer previously filed in this matter, Defendants Herbert Kubisch, Genevieve Walters, Margaret Gouin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Beatrice [sic] Dolan, Marilyn Moore, Donald C. Russell, Robert Phillips and Charles Becker, by and through their attorneys, Thrun, Maatsch and Nordberg, P.C., answer Plaintiffs' Complaint, as amended, as follows:

AFFIRMATIVE DEFENSE

47. Defendants reiterate their answers in the first 46 paragraphs of their Answer as if fully set forth herein.

48. Defendants affirmatively state that at all times pertinent to this cause, their actions with respect to Plaintiffs were done in the reasonable and good faith belief that those actions were lawful, therefore, Defendants are immune from liabilty to Plaintiffs.

WHEREFORE, Defendants request that Plaintiffs' Complaint against them be dismissed and that they be awarded costs, attorneys fees, and such other relief as may be deemed equitable.

THRUN, MAATSCH AND NORDBERG, P.C.
Attorneys for Defendants

By _____
Thomas J. Nordberg

Business Address:
501 South Capital, Suite 500
Lansing, Michigan 48933

Dated: May __, 1981

Testimony of Edward J. Stachura
(Direct Exam)

[295] Q. Let's return to the morning of April 24, 1979, when you were instructed to report to Mr. Russell's office. What did it feel like sitting there and listening to Mr. Russell say to you the things you testified earlier he said?

A. Sickening.

Q. Sickening, how? Can you explain?

A. Well, I felt physically ill. And during the course of the conversations and afterwards, I felt emotionally wrecked, humiliated. I don't think there are enough words to describe the way I felt. Awful doesn't quite get it, terrible doesn't. It's such an unreal feeling, I couldn't believe it was happening. I couldn't believe that it was happening in [296] America, I couldn't believe it was happening to me. The whole thing was a nightmare.

Q. Did you go to your classroom that morning, after you left Mr. Russell's office?

A. Yes, I did.

Q. Was class in session?

A. Yes, a substitute teacher was already teaching my class.

Q. For what purpose did you to to your room that morning?

A. Well, I was told I wouldn't be back, so I had to get some things that I had in there, magazines and what have you, whatever a teacher has in his desk that belongs to him as compared to the school.

Q. Did you walk into the room? What did you do, class was going on and you went to go in.

A. Well, I knocked on the door and asked the substitute teacher if it were all right if I could come in and get my stuff.

And the kids were there. They all started talking: I heard he got fired, my mom said she wasn't going to send me to class today if he was here, and are you coming back, Mr. Stachura? What happened, we'll see you later. All these things.

Q. You heard these kinds ot statements made?

[297] A. Oh, sure, they were all talking and they were all—

Q. How did it feel to have those questions addressed to you by a bunch of seventh graders?

A. Certainly not good.

Q. Did you respond in any way?

A. Yes, I told them not to worry about it.

Q. Did you cry?

A. (nods head)

Q. How did you get home on the morning of April 24, Mr. Stachura?

A. I had to call my wife.

Q. You hadn't driven to school that morning?

A. No.

Q. What was it like calling your wife in the middle of the morning and asking her to come and get you?

A. Well, calling her was no problem, but trying to explain why she should come and get me certainly was. What could I tell her?

Q. Do you recall what you told her?

A. I told her to come on, pick me up, and things would be okay, and don't worry about it. I would try to explain everything later on.

Q. Did she come alone or did she bring any of the kids with her?

A. Yes, she brought both my children.

[298] Q. What was it like facing those kids?

A. Well, Kimmy was two, you know, and that was no problem. She acted like a typical loving daughter, I guess: Hi daddy and she came up to me. And my son, of course was real happy to see me: Hi, Dad, watcha' doing? He wanted to go in: Hey, can I come in and see your classroom?

Q. Had you taken him to the classroom prior to this time?

A. Oh, yeah, every place I ever taught, he's been around. Sure, he loves it. He goes with his dad to work: Come on in, I'll show you, look at the fish aquarium, look at the models, and the displays. He loved it, he would write on the chalkboard with the chalk.

Q. Did he ask on the morning of April 24, can I go in and see your classroom, dad?

A. He certainly did.

Q. What did you say to him?

A. I told him not today, son, it wasn't a good day to do it.

Q. Did you give any explanation, any other explanation to him?

A. Well, I just told him that I was coming home and I didn't feel real well, but we'll see it again, you [299] know, next time you're here. I promise you I'll take you through it.

He still wanted to know why he couldn't come in to my classroom.

Q. Did the events of the school board meeting the night of April 23 make the local newspapers?

A. Yes.

Q. Did you have occasion to see articles about yourself?

A. Yes.

Q. Did you ever hear any reports on the radio or television about the event of the 23rd and the accusations made against you?

A. I did.

Q. What is it like reading about yourself in the newspaper, Mr. Stachura?

A. Well, I imagine if they wrote something good, it would be a real pleasure, but if it's emotionally traumatic, to see a lot of garbage written about you that doesn't have any substantiation, it makes you feel terrible because here you are, that's me in the paper alright.

I don't have any words in there, somebody else's words are about me. It went on and on and on. It doesn't feel very good, it makes you feel angry, darned angry, and you can't believe [300] it's happening to you, you can't believe that that kind of thing could happen, not here anyway.

Q. Let me show you, Mr. Stachura, proposed exhibits number six, seven, eight, nine, ten, thirteen, fourteen, fifteen and nineteen; are those examples of newspaper accounts of April 23 and events which followed, specifically pertaining to you?

A. They are.

MR. HELDT: I would move their admission at this time, your Honor, and ask specifically that the jury be instructed as to the limited purpose for which they are offered.

THE COURT: The Court will ask the defendants: Are there any objections other than those stated at the pretrial, during the pretrial hearings, on this matter where the Court originally ruled?

MR. BERARDO: Your Honor, other than those statements I think we should be entitled to examine the witness as to his knowledge of these particular articles and when they appeared.

THE COURT: You may voir dire on any of them, Mr. Berardo. You may proceed.

MR. BERARDO: Are these numbered the same as those you gave us and Mrs. Tryszkowski, so [301) I can inquire?

MR. HELDT: I believe so, they should be.

MR. BERARDO: Mr. Stachura, referring to proposed exhibit number six, did you read this article in the newspaper when it was published?

A. I did.

MR. BERARDO: Did you cut this article from the paper?

A. I did.

MR. BERARDO: Did you then present it to your attorneys?

A. I did.

MR. BERARDO: Can you identify the date it was published?

A. April 24, 1979.

MR. BERARDO: I noticed that this is typed on this copy that I have. Is it typed on your copy?

A. It certainly is.

MR. BERARDO: Did you type that date on the article?

A. No, I did not.

MR. BERARDO: Who did?

[302] A. I have no idea who typed that.

MR. BERARDO: Is that also true of the balance of the exhibits?

A. I haven't examined all of the exhibits, sir.

MR. BERARDO: Did you put a date on proposed number seven — excuse me is that a newspaper article, number seven?

A. It's entitled number seven, affidavit, state of New York, County of New York.

MR. BERARDO: Is that in reference to an article that's attached to it?

A. Yes, it is.

MR. BERARDO: With regard to exhibit number eight, the article from the Detroit News of Detroit, Michigan, did you clip this article from the newspaper?

A. I read that and submitted it to my attorneys, yes.

MR. BERARDO: When is that dated?

A. This has a titled date as part of the paper; Wednesday, April 25, 1979.

MR. BERARDO: With regard to the article exhibit number nine proposed, did you clip this article from the newspaper?

A. Whether I clipped it or submitted the whole thing, I'm not sure.

[303] MR. BERARDO: Do you subscribe to the Richmond Review?

A. I do not subscribe to the Richmond Review. It comes out every Wednesday and we buy a copy every Wednesday.

MR. BERARDO: Did you subscribe to the Detroit News?

A. No, I don't, it's available at the local news stand.

MR. BERARDO: Do you buy it every day?

A. I do not buy it every day, but I was buying them in particular around that time.

MR. BERARDO: What are the newspapers you were buying at that time? Do you recall?

A. The News, Detroit News, the Detroit Free Press, the Macomb Daily, the Michigan Review, the Port Huron Times Herald were the ones we were purchasing because they were available without driving twenty or so miles. They were available to us.

MR. BERARDO: Mr. Stachura, with regard to exhibit number 10, is this an article from the Macomb Daily?

A. It is identified as such, yes.

MR. BERARDO: Did you cut this article from the newspaper?

[304] A. I don't recall whether I cut this one out.

MR. BERARDO: Were any of the articles collected by persons other than yourself?

A. Yes.

MR. BERARDO: With regard to proposed exhibit number thirteen, can you tell us which newspaper this if from.

A. The Richmond Review.

MR. BERARDO: Did you cut this article out by yourself, did you do it personally?

A. I believe so.

MR. BERARDO: You're not sure, are you?

A. I cut an awful lot of them out, and I didn't miss a day. That looks like my handwriting.

MR. BERARDO: Mr. Stachura, with regard to exhibit number fourteen, do you have a subscription to the Pacific Stars and Stripes?

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[305] [A] No, I do not.

THE COURT: Does that conclude your interrogation?

MR. BERARDO: Yes, Your Honor.

THE COURT: Mrs. Tryszkowski, did you have any questions you wanted to ask him relative to this article?

DEFENDANT TRYSZKOWSKI: No, Your Honor.

THE COURT: Were there objections other than those stated earlier that the Court has ruled on?

MR. BERARDO: No, Your Honor.

THE COURT: The Court will at this time, then, in accordance with its earlier ruling, admit exhibits six, seven, eight, nine, ten, thirteen, fourteen, fifteen, and nineteen.

Members of the jury, the Court has admitted these newspaper articles into evidence for [306] a limited purpose, specifically, they are offered not to show the truth of the statements contained within the articles, rather they are offered only to show that the articles were, in fact, published.

All right, you may proceed, Mr. Heldt.

MR. HELDT: Thank you, Your Honor.

Q. (Mr. Heldt continuing.) What is the Pacific Stars and Stripes, Mr. Stachura?

A. It's a military service newspaper that covers the far east, the Pacific area for the servicemen.

Q. Did you have occasion to see it with some regularity when you were in Japan?

A. Oh, yes. We looked forward to getting a copy of it.

Q. How did you obtain exhibit fourteen, the April 28, 1979 article from Pacific Stars and Stripes?

A. Well, we had lived in Japan for four years, we made some good friends and they were regular readers of the Pacific Stars and Stripes. And immediately, as soon as they recognized this article, they cut it out and sent it to us and asked us what was going on.

Q. Did you have any relatives in the Metropolitan area of Detroit?

A. Yes, I do.

Q. Who?

[307] A. My brother, two sisters, my mother and father; in and around the Detroit area, my parents-in-law in Mt. Clemens, and other friends.

Q. Specific relatives I was asking about.

A. I'm sorry.

Q. Where does your brother live?

A. In Detroit.

Q. And where do your parents live?

A. In Detroit.

Q. And where do your in-laws live?

A. Mt. Clemens.

Q. Does your wife have any sisters or brothers who live in the area?

A. No, she does not.

Q. Were you contacted by any of them regarding newspaper publicity of the events of April 23 and thereafter?

A. Yes, I was.

Q. Did you make any effort to seek any of them out, to advise them of what had transpired of your own initiative?

A. Well, yes, I talked to my brother and to my sisters.

Q. What's it like, Mr. Stachura, to have to call your relatives — strike that.

What is it like to call your relatives and alert them to the prospect of seeking a family name [308] in the paper?

A. It takes a lot of explaining. It made me feel uncomfortable, it makes you feel really rotten. I'm at a loss for words as to how to describe it. When you call somebody up and say: Gee, you're going to see me in the paper, don't believe that stuff,

but you know, you'll probably see it because it's there, I just wanted to warn you about it so you wouldn't be shocked or hurt and I tried to get ahold —

Q. Did you make any specific plans with respect to talking to your parents?

A. Yes, I did.

Q. Why?

A. My father has a heart condition, he has hypertension and his blood pressure goes back and forth. Sometimes it can get quite high when he's excited.

I had planned to call him and set up a meeting where we could do some talking. My wife Georgia and I would go down and, maybe, over a cup of coffee break it to him slowly.

Q. Did those plans come to fruition, were you able to do that?

A. No.

Q. What happened?

A. That Friday I got a call from may parents. My mom [309] said: "What the heck is going on, your dad's blood pressure is up to over 220".

Q. So you weren't able to break the news to them?

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[312] Q. In addition to relatives and in-laws, do you have any friends in the Detroit metropolitan area?

A. Yes.

Q. You live in the City of Richmond, do you not?

A. Yes.

Q. Do you have neighbors?

A. Yes.

Q. Whether or not they are friends, they are certainly acquaintances?

[313] A. Yes.

Q. They know you, you know them?

A. Yes.

Q. How did you feel about seeing this publicity in relation to other people besides your relatives who knew you?

A. Well, I felt very badly about it and we were getting to know people, my wife and I both felt bad to the point that we shied away from people. I stayed indoors as much as possible except for working in my yard. The neighbors would find their way over: What's going on, what happened, Ed?

Some would just come over and have a long conversation and would eventually bring it up.

Q. How long did you try and stay away from people? A couple of days, a couple weeks, months, how long?

A. Well, in terms of time, I think it's still going on.

Q. How.

A. Well, I don't frequent a lot of the public places, it's just been this year that I've tried to break out of this shell of shame, I guess you could call it, and try to participate in community activities that get me introduced to new people and to what's going on in the community.

[314] Q. Why didn't you prior to this year, was there anything in particular you were afraid of?

A. Yes, I got tired of answering questions all the time, I got tired of having people talk about me.

Q. What kind of questions did you get tired of answering?

A. Did this happen, what are you going to do, you know, do you have enough money to make it, where are you going to work, are you guys planning on moving, what are you going to do next, questions in general about all the things in the newspaper and all that they had heard through the gossip vine.

Q. Following the events of April 23 at the school board meeting, were you personally contacted by the news media.

A. Yes, quite a few times.

Q. Did you make any statements to the news media?

A. Not many. I told them that there was another side to this, and that I someday hoped to have a chance to tell it.

Q. Did you give any thought of going to the press and making more elaborate statements of your position?

A. I was encouraged to do that, but that would just be battling the newspapers, and I thought there was an easier way to settle it and maybe somebody would [315] have a change of heart and recognize the mistakes and maybe this wouldn't continue to go.

I didn't want to say anything that would jeopardize my going back to school or jeopardize myself anymore, start a great big controversy. I would say this, they would say that, I would say this, they would say that; I didn't want any part of that. I was sick enough of what I read already.

Q. Other than contacts from the news media, did you receive any other phone calls following the board meeting on the night of April 23?

A. Yes, I did.

Q. Over what period of time?

A. As recently as Saturday night.

Q. This is last Saturday night? Well, let's go back to following the board meeting on April 23, other than the news media calls, did you start getting other kinds of calls?

A. Yes.

Q. What kinds of calls?

A. Crack-pot calls, harassing phone calls, phone calls. A couple of people called up and said oh, boy, we're all for sex ed and we sure think it ought to be taught in the schools and you probably this and that. They went on and on. Some praised me and others, [316] of course, were violent, vile, piggish type phone calls.

Q. Did people swear at you on the phone? Call you dirty names?

A. That was part of it, yes.

Q. When in relation to the board meeting of April 23 did those kinds of phone calls begin?

A. Well, I had one the night of the 23rd and I had one last Saturday, many in between. Most of them, every time I was scheduled to bring this case to court or to take any action on it, the phone calls started coming in. They were all hours and they were harassing phone calls.

Sometimes there would be nobody that would say anything, you could just hear somebody breathing for a few seconds and then it would click, then a few minutes later it would ring again and the same thing, click.

Sometimes they would ask for my wife, or my wife would answer and they would say: Is Mr. Stachura there?

Yes, he is. Who's calling?

It's just a friend.

I would get it and the person would really lay into me.

[317] Q. In an unfriendly way?

A. Most unfriendly way, yes.

Q. What did you do with these kinds of calls, how did you respond?

A. Well, most of the time I hung up. Other times I listened so I could try to recognize a voice so at some later time maybe I could get to this person in some way, talk to this person, report it to the authorities.

Q. From April 24, when you were suspended, to the end of the school year in early June, did either of your children ever make any remark to you about being home all the time and not going to work?

A. Well, my son did. He wanted to know why my summer vacation — why he was going to kindergarten at the time and he wanted to know why was daddy home, why didn't I have school like he had school?

Q. What did you tell him?

A. Oh, I made up all kinds of excuses. I can't remember all of them, but all kinds of things.

Q. Why did you make up excuses? Why didn't you tell Eddie what had happened?

A. Well, since this has happened and until just recently, we have protected both of the children. For the most part, they don't know about it. Kimmie not at [318] all, she's been totally protected. And my son, I just told him a few days ago that — he reads pretty well and I told him that he may see articles in the newspaper about his daddy.

I also explained to him that I would be in a trial, and that there would be a judge and a jury and tried to explain that to him so that if he heard about it or read about it, not be concerned about it and that it was okay.

Except for that, I always protected them. Why should he become a part of this dirt?

Q. What's it like lying to your son?

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A. We have a very nice, what I consider honest family. They've been brought up to always tell the truth. They've tried to do that and we've tried to do that with our children. So my making up excuses for why I wasn't at work was in protection of him. I would [319] much rather have been able to say: Yes, son, I — well, I just couldn't get myself to tell him what had happened. There's no way he could understand it, and he certainly would be hurt by it if he knew I wasn't working any more.

He had a lot of pride, and still does in his daddy as a teacher. He needs his teacher and he likes all of them, he likes me, not only am I his father, but daddy is a teacher.

Q. Did your son ever come home from school and give you any indication that he was hearing things there about the incident in 1979?

A. Indirectly. He didn't say anything about April or anything like that, but he came home one day a little upset and wanted to know about, you know, what does it mean to be fired. And he asked me, you know, was I still working at Memphis.

I explained both things and I told him, yes, I was told I was and that firing meant you were let go from your job.

Q. Did he come home with these kinds of questions in the spring of '79 or some other time?

A. It was in the spring of 1979.

Q. After you had been suspended?

A. Yes.

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[336] [Q]. Let me direct your attention, Mr. Stachura to plaintiff's exhibit number six, an article from the Port Huron Times Herald dated April 24, 1979, which I have placed before you; do you have it?

A. Yes, I do.

Q. As of April 24, 1979, did you subscribe, receive by way of home delivery, the Port Huron Times Herald at your home?

A. Yes.

Q. In the middle of the third column of the article, in the course of the reporting alleged charges, it is stated —

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[338] Q. The article states in part, Mr. Stachura: "Parents also said he frequently touched female students."

Do you see that language?

A. Yes, I do.

Q. Do you recall seeing that at or about April 24, 1979?

A. Yes.

Q. How did it feel to read in the newspaper that suggestion that you had frequently touched female students?

A. I was very, very hurt by that, that anybody would dare say something like that. The other things it made me feel was a tremendous amount of anger, a tremendous amount of anger. It crossed my mind to [339] find out who said that, and I felt like punching them in the nose.

It was just one more devastating blow, another accusation. I hadn't even been there and I felt rotten, and my wife saw that, and of course, she knew better, but she said: These people are terrible, and I had to agree with her. I felt very bad about it.

Q. Did you frequently touch female students at any time in your professional career?

A. I have never, no way.

Q. You returned to the classroom at the Memphis High School in the fall of 1979, did you not?

A. Yes, I did.

Q. What was it like going back to school under court order in September of 1979?

A. Frightening.

Q. Why?

A. Well, all the rumors were still there, nothing had been done to dispel any of the rumors. I got back into the classroom because of a federal order, not because somebody said: Hey, these things have been investigated and they're wild and crazy, and they're not true. So the federal judge put me back in the classroom and this still left — even though I was [340] back, it still left this big cloud over my head about my reputation, about my conduct in the classroom.

Q. What classes were you assigned to teach in September of 1979?

A. I was assigned ninth grade science, physical science and tenth grade biology.

Q. The ninth graders, had you had any of them as students before?

A. Yes. They had been, the previous year, the eighth graders and the year previous to that in the 1977-78 school year, I had them as seventh graders.

Q. You taught them life science in 1977-78?

A. Yes.

Q. And they were junior high students in the eighth grade in '78-79 when these events ocurred?

A. Yes.

Q. They were now your students in September of 1979 again?

A. Yes.

Q. Do you recall the first day, what it was like walking into that classroom?

A. It was the hardest thing — well, I almost didn't get there to begin with. I didn't sleep all night, I considered not going back. It's a pretty hard thing [341] to face, a lot of people that accused you, you're not sure who accuse you of what, and you have to go there and face them and nobody says one word like: Gee, maybe that's not true. So I almost didn't go back. My wife and I sat down and talked about it and I picked up my brief case and went in.

I talked to the other science teacher, Mr. Clement, whom I hadn't really known at that time, but I told him of my concern. I was trembling.

He said, oh heck, you can go in there and do it. You've done it before, he said.

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A. He encouraged me to go forward. And I walked into the classroom, and all the little comments: We didn't know you were going to be back, hi, what are you going to teach, you going to teach us more sex education, and stuff like that.

At that point I felt I was just going [342] to absolutely fall apart. I reached down for my brief case, I picked it up and made the decision that I would stick it out. I put it back down, I closed the door.

I proceeded to greet them as if I had never had them before, and that I didn't know any of their names or any of their personalities. I wrote my name on the board as if they had never seen it before.

And I proceeded for the whole year — and I might add, I never smiled during that whole year, it had been my habit to laugh with the kids, be strict with them, but to make sure that I and they both enjoyed the educational experience. It doesn't have to be drudgery, it doesn't have to be a terrible experience, that had always been my policy. I couldn't let down for one second because I wasn't sure who had said what.

I knew that the community was very divided and that also made me feel very nervous inside. There were many students, because of their allegiance to other students, who probably had said something negative about me, and didn't have the courtesy to say good morning or hello. They absolutely ignored me, they ignored me in the classroom, and re- [343] fused to answer questions. They ignored me in the hallway. I was like a germ to them that they wanted nothing to do with, and it was the hardest day of my life ever. I was more nervous that day than I was on my first day of student teaching.

Q. Were there any other incidents other than students in the classroom making comments to you, any incidents involving people from outside the classroom?

A. Yes. Early in the first hour, two senior or junior students, I'm not sure who they were, knocked on the door very loudly in a rude way and before I got to it, they opened it up, both stuck their heads in and said: Hey, kids, what are you learning? Sex ed; and hey, they let you back here, didn't they?

And they slammed the door and ran down the hallway.

That was another thing that made me feel real good — I'm being a litle facetious, of course, but it tore my guts out.

Q. Before the events of April of 1979, were you involved in extra-curricular activities at the Memphis Middle School?

A. Yes, I was.

Q. What kind of activities did you involve yourself in?

[344] A. Well, I worked with the student council to acquire some stereo equipment, I chaperoned dances, I took tickets, I helped out in general in any way that I could. I tried to attend as many functions as possible.

Q. Were you, prior to April of 1979 — did you attempt to involve yourself in the Memphis community?

A. Yes, I shopped in the Memphis community, I went to the local taverns in the Memphis community, I felt very comfortable in the Memphis community.

Q. Why did you involve yourself in extracurricular activities and attempt to involve yourself in the Memphis community?

A. Well, I think it's good policy as much as possible that a teacher should get involved, that the more you know about the community, the more you know about the students and parents and their inter-actions in a non-classroom setting. I think that's valuable, and it gave me an opportunity to see how kids were outside of the classroom. And I thought that was a valuable thing that teachers do, not uncommon for teachers to get involved, both with their students after school, or with the community.

Q. Did the events of April, 1979 affect your involvement in either extracurricular activities or in the Memphis [345] community generally?

A. Yes.

Q. How?

A. Since that time, I participated in no extracurricular activities. I think I made one purchase in one store in three years, where as before I would do shopping there.

Q. Why did you cease your involvement in extracurricular activities, change your shopping habits, following the events of April, 1979?

A. Well, first of all, after the meeting of the 23rd of April, I was told it was a real good thing that I wasn't at that meeting because, without a doubt, I would have suffered physical harm. I knew that it was a small community, I knew that the community was polarized. I had supporters and it was the other side that came up with these things. I knew that the feelings were strong.

I did not want to go to a football game or basketball game, and unfortunately, it's not uncommon for some students and parents to come under the influence of alcohol and these things, and I thought that may preclude their good judgment and I would get into some kind of physical altercation which would, once again, make the headlines.

[346] And I could almost envision: Sex Ed Teacher in Personal Confrontation with Some Parent.

I certainly didn't need anymore bad press, so I thought rather than try to prejudice the community by my presence one way or another, both those people that I would have liked to met with at their homes, because they supported me, or to cause problems to the people that were against me, I thought it was prudent to stay out of the community altogether, including extracurricular activities and I've done that.

Q. Did the events of April, 1979 affect any of your shopping habits or your behavior in the Richmond community where you live?

A. Well, it did.

Q. How?

A. In similar ways with neighbors, in shopping, Richmond is a little larger and has a larger selection of stores, but for the most part, we would drive down to Port Huron or around 14-Mile and Gratiot to Sears-Macomb Mall and do shopping there.

We were so close together, Richmond and Memphis, and there are so many families that have members in both communities that even in Richmond I was a topic of controversy. Although I wasn't [347] quite afraid of physical harm in Richmond, I thought I be[illegible] keep a low profile. I certainly got tired of walking into a store and, you know: Yeah, aren't you the guy, how's it going by the way?

Some people said they really felt sorry for me and other people went on and on for two or three hours what they thought about sex education. It was a form of harassment.

Every place my wife or I went, especially together, we were asked or questioned about the events that went on and all kinds of comments were made. We did not feel we were going shopping so we could tell the world some kind of story that would be misinterpreted one way or another or to argue any points with the community. We wanted at that time to be left alone.

I also had an opportunity to get a job for the summer, often times —

Q. This is which summer?

A. This is the summer of 1979. One of the part-time jobs I've done in the past has to be a bartender. I had been that overseas in the military clubs and I had an opportunity for summer employment. A man told me, he said, I don't care what they say you've done, I need a bartender. He checked me out, put

[348] me through my paces and said: If you want the job you have it.

Q. Did you take it?

A. Well, I did take it.

Q. For how long?

A. One day.

Q. This was in the summer of '79?

A. Yes.

Q. Did you quit after one day?

A. Yes, I did.

Q. Why?

A. It became apparent to me in that one day that I recognized family faces from the Memphis community. I had been asked by seven to ten different patrons about my case. They knew me, I didn't know them. Many were strangers to me.

Somebody said: Oh, yeah, that's the guy that has all the garbage written about him or whatever. And everybody knew me.

So instead of bartending, I continued to bartend, but it's not easy when you have to sit and try to discuss things with every patron, and you have tables and things like that.

Also, for the same reason that I didn't think it was safe to go to the games or attend [349] outside functions in the Memphis community, it dawned upon me at the end of the day or during the day that we're only six miles away, a bunch of folks could come in here and hear somebody discussing it, have somebody point a finger, maybe they have a few beers in them, and over the bar they'll come and a big altercation would happen.

This man was the only man who had said: Hey, Ed, I don't care and I don't believe that about you, You can work for me anyway.

Out of respect for him, and also because I didn't want any more problems, I said that I was sorry, that I couldn't help him out. I was very, very sorry about that, and I knew he needed someone.

Q. Did you quit after one day?

A. I told him that that would be it, and that was it.

Q. In December of 1979 or January of 1980, did you become award of the circulation of Esquire Magazine at the Memphis High School?

A. Yes.

Q. How did you become aware of that?

A. Well, between classes, we have an approximately four to five minute break and walking down the hall way to check my mailbox, three or four kids ran up and [350] said, hey, Mr. Stachura, guess what.

I said, what?

They said, hey, you've made Esquire Magazine's Dubious Achievement Award.

The didn't have the magazine with them. I went to class next hour and somebody produced it in the classroom and was passing it around.

I was a subject of ridicule. They all pointed it out and everybody in the class had seen it in a matter of minutes. I was told the magazine was out of the School Library and I wouldn't confiscate it, but I would appreciate it if we could go on with the lesson and put it away.

Q. I'll show you what's been marked as proposed exhibit number sixteen, Mr. Stachura, and ask is that the cover of the Esquire Magazine in which you appear, as well as the pages of the magazine which refer to dubious achievement awards for the year 1979?

A. Yes.

Q. And there is an entry which refers to you in that exhibit, the first column on the second page I believe.

A. Yes.

MR. HELDT: I would move the admission of exhibit sixteen, Your Honor.

THE COURT: Are there any objections [351] to sixteen, other than those set forth earlier and which the Court has ruled on in the pretrial ruling, Mr. Berardo?

MR. BERARDO: No, Your Honor.

THE COURT: Mrs. Tryszkowski?

DEFENDANT TRYSZKOWSKI: No, Your Honor.

THE COURT: The Court is going to admit exhibit sixteen, which is a magazine article from Esquire Magazine. The Court calls to your attention, however, that this magazine article is being admitted for a limited purpose.

Once again, this article has not been admitted to show the truth of the statements contained within the article. The article has only been admitted to show that the article was, in fact, published. All right, the Court will admit exhibit sixteen at this time.

Q. How did it feel to be reminded in December of 1979 and January of '80 of these events by your students and to learn of your having been referenced amongst the dubious achievement awards of 1979?

A. Well, feeling wise, what it did was bring up all the feelings of having my guts ripped out again and again. And every reminder, of course, brought back [352] the nightmare of the whole thing; numbing, there's only so much you can take. We went ahead and got on with the lessons.

Q. What classes did you teach in the Memphis school system in the fall of 1981, I'm sorry, in the fall of 1980, a year and six months after these events in the fall of 1980?

A. I was teaching physical science and biology.

Q. To what grade?

A. Ninth and tenth.

Q. Were the ninth graders in the fall of 1980 the same students you had had in the spring of 1979?

A. Yes, they were.

Q. What was it like facing, nineteen months later, the same students in a classroom setting?

A. Well, I had stuck it out the year before, but this particular group where the complaints came from, I was particularly angry about that, and I was particularly angry that here it is going on eighteen months, two years practically, and no one, no one had admonished these people or told them it was wrong, a lie, wrong to bring up false accusations, wrong to do what they had done.

My initial feeling with that group was, you know, it may cost me my job, but I'm going [353] to close the door, and stand in front of it, and I'm going to lecture them for one whole hour on why they oughtn't ever, ever do that to anyone for the rest of their lives.

Q. Did you deliver such a lecture?

A. Although I was tempted, I did not.

Q. Did you say anything to them about the events of April of 1979?

A. No, I felt that I had been hired to teach, instruct a particular course, and my personal feelings had to be pushed aside even though my gut feelings were that it may serve a better purpose to lecture for an entire hour on why they shouldn't do what they had done than to teach them an hour of physical science.

But I went ahead and taught

Q. Did the events of April, 1979 affect your classroom performance when you returned to the classroom in the fall of 1979?

A. It did.

Q. How?

A. Well, there was no happiness to it anymore, there was no joviality, no almost, comraderie. When you have a group of students and you like what you're doing and you like teaching, it's not drudgery to [354] get up in the morning and go to work, it's. There's time when it's almost overwhelming, but there's a spirit, there's a love, there's a happiness, that you go to your job with, and I think it affects how well you do a job.

And I lost that, it was taken away from me. I still have not gotten it back. I tried an awful lot of things, and it's still gone, and it's more like going to work to work instead of going to work as part of your life, as part of your entire being. And that's what education has always been to me.

That is gone. I'm not quite sure how to get it back. I've got a few plans, and I hope it comes back, because I really don't think I can go on without it coming back.

MR. HELDT: I have no further questions on direct examination.

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Testimony of Kenneth Grinstead, PhD.
(Direct Exam)

[841] BY MR. HELDT:

Q. Will you state your name for the record, please.

A. Kenneth Grinstead.

Q. Are you employed at the present time, sir?

A. I'm employed as a Professor in Educational Administration at Eastern Michigan University.

Q. What is your educational background, degrees, years, institutions, if you please?

A. I graduated from Iowa Wesleyan College in 1949 with a BA Degree.

I have a Master's degree from the University of Iowa in 1957, and a PhD in Educational Administration from the University of Iowa in 1963.

(842) Q. How long have you been a professor at Eastern Michigan University?

A. Since 1964.

Q. In what college or department?

A. I'm in the college of education and in the department of educational administration.

Q. Do you have any present teaching responsibilities?

A. Yes, I teach classes at the graduate school level and the clases are --

Q. And in what subject areas?

A. School law, collective negotiations and education and school finance.

Q. Have you had any other teaching responsibilities in any other areas other than those three in the last five or ten years?

A. I occasionally teach a class which is entitled Educational Organization, it's a class that defines and describes the structure of organization and education relative to the Federal Government, State Government, intermediate school districts and local school districts.

Q. In the last five years, have you engaged in any professional activities other than teaching at Eastern Michigan University?

A. Yes, I'm quite active in several professional organizations. I do a considerable amount of writing and consulting work; [843] I am an arbitrator with the American Arbitration Association; and a fact finder and arbitrator with the State of Michigan.

Q. Have any of your arbitration or fact finding activities pertained to public schools?

A. Yes.

Q. Are you a member of any professional organizations pertaining to educational personnel or administration?

A. Yes, I am a member of the Michigan Association of School Personnel Directors, the Michigan Association of School Business Officials, the Michigan Association of School Administrators and the National Organization on Legal Problems in Education as well as the American Arbitration Association.

Q. Have you ever been a member or active in either the Michigan Education Association or the National Education Association?

A. I have not been since approximately 1965, shortly after the passage of the Michigan Employment Relations Act. The

Michigan Education Association split with the administrator groups, and since that time I have not been active with the Michigan Education Association or the NEA, except to serve occasionally as a fact finder or arbitrator.

Q. That's as a neutral party in the assistance -- that's as [844] a neutral party.

Q. Resolving disputes?

A. Correct.

Q. In the course of your work in school finance, in addition to teaching did you have occasion to deliver seminars or lectures on school finance to outside groups?

A. Occasionally, but not often in the area of school finance.

Q. Do you study problems in school finance as they relate to your teaching of school finance?

A. Oh, yes.

Q. In the course of your work in that field, do you have knowledge of the employment marketplace from a demographic standpoint in Michigan and around the country regarding the number of teachers versus the number of available jobs?

A. Yes, there are a good many publications that cross my desk related to these kinds of problems, and contain that sort of information. These are generated by professional organizations as well as governmental agencies.

Q. Does that data, the demographics of teachers versus jobs, have any impact on school finance?

A. Well, it has a great deal of impact.

Q. Why?

A. The budget of the school district is approximately sixty-five to eighty-five percent, depending upon the [845] school

district for personnel costs; and the cost of the teachers is a very large part of the personnel costs.

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[846] Q. Have you specifically examined and brought with you statistics on the number of teachers in different areas of specialty as related to the number of available jobs across the country?

A. Yes.

Q. Is this data that you have examined, and at least some of which you brought with you, of the type customarily relied upon by experts in the field in forming opinions on the subject?

A. Yes, it is.

Q. Are you familiar with teacher recruitment policies and practices generally across the county [sic], the process by which teachers are hired?

A. Yes, I am, very much so.

Q. How have you gained that kind of familiarity with that process?

A. Well, by being a professor in the college of education and working closely with students, I am quite familiar with the process by which people get jobs.

Also, I am quite active in the Michigan School Personnel Association, and attend their meetings and conferences; consequently, I receive a good bit of information through that source.

Q. Do you have occasion to read articles in your professional work on that subject?

[847] A. Yes.

Q. Is that information the type of information which you and other experts customarily rely on in the field in forming opinions on the subject of how the process works?

A. Yes.

MR. HELDT: Your Honor, we would offer Professor Grinstead as an expert on the demographics of the teacher job market and the process by which teachers are placed or obtained jobs within their fields.

THE COURT: Do you wish to voir dire, Mr. Berardo?

MR. BERARDO: Yes, Your Honor.

THE COURT: You may proceed.

MR. BERARDO: Professor Grinstead, are you being paid for your appearance here as a witness today?

A. Yes, I am.

MR. BERARDO: By whom?

A. I think by the firm representing the plaintiff.

MR. BERARDO: Have you even had any employment from the Michigan Educational Association?

A. I don't think I ever had. I cannot recall any.

MR. BERARDO: Have you ever served as an arbitrator for any internal union disputes?

[848] A. No.

MR. BERARDO: Professor Grinstead, do you have with you today statistics as to the number of teachers in the State of Michigan?

A. I believe I do.

MR. BERARDO: Do you have statistics as to the number of unemployed teachers in the State of Michigan?

A. I believe so.

MR. BERARDO: Do you have statistics as to the number of teachers hired in the last year in the State of Michigan?

A. I believe I do.

MR. BERARDO: Do you have statistics as to the number of teachers who have left the State of Michigan for employment opportunities elsewhere?

A. No, I do not.

MR. BERARDO: Do you have statistics for the number of employment opportunities available to teachers in other states?

A. I believe I do.

MR. BERARDO: Do you have any placement responsibilities at Eastern Michigan University?

[849] A. Not officially.

MR. BERARDO: Have you ever?

A. No.

MR. BERARDO: Have you written any articles concerning teacher demographics?

A. No, I have not.

MR. BERARDO: Have you written any articles about teacher unemployment?

A. I wrote an article in 1979, it was titled Layoff and Recall of Tenured Teachers in Michigan.

MR. BERARDO: Is that related more to the procedures by which layoffs are made than to demographics?

A. Yes.

MR. BERARDO: Have you written any articles about employment qualifications for teachers?

A. I wrote an article for the Michigan Association of Elementary Principals which was entitled A Valuation of Teachers.

MR. BERARDO: Is this for existing teachers on staff?

A. Yes.

MR. BERARDO: Have you written any articles to assist the board of education in evaluating any candidates for employment?

[850] A. No, I have not.

MR. BERARDO: Have you ever served as a board member?

A. No.

MR. BERARDO: Have you ever advised on the employment on any teachers in a consulting capacity?

A. No.

MR. BERARDO: Your Honor, I would object to the qualifications of this witness.

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[851] THE COURT: The Court notes the objection, but the Court will recognize Professor Grinstead as an expert under Rule 702 in the area of the demographics of the teacher job market and the methods by which teachers get jobs and the area of expertise in which he has been offered. You may proceed, Mr. Heldt.

MR. HELDT: Thank you, Your [852] Honor.

Q. Professor, does the hiring process by which school districts find teachers and teachers find districts to work for, does that process vary particularly across the country?

A. Well, I have worked in three states and it is quite similar in those three states, and from that I assume it's the same throughout the nation.

Q. Which three states are you referring to?

A. Iowa, Kentucky and Michigan.

Q. I would like you to focus your attention from 1979 to the present, and I would like to ask you to describe the basic process by which teachers find teaching positions and school boards find teachers; could you do that, please.

A. When a student finishes his undergraduate degree program, he will go to an office on campus which is called the placement center or career center some name similar to that, and fill out or complete a set of credentials. The credentials will have in them the classes the student has taken at the university, the teaching subjects for which the teacher is certified, other kinds of data: age, sex, race, things of that type may be there.

In addition to that, the [853] student will accumulate letters of recommendation. The student is in control of who writes those letters. The student is asked to request certain people to fill out the form and send it into the university. The student has the right to see those letters or to waive the right to see the letters, and when the person fills out the letter of recommendation, he or she will know that.

Those credentials then are, when they are completed, put in what is called the active file, which means that these are the people who are looking for jobs. Then when school boards have vacancies, they will notify the placement center and the placement center will use one of two methods of notifying the student. They will either publish all of the vacancies that they have available and send those to all the people in the active file, that's the typical method that you use in Michigan.

The other method would be that the placement center using, probably, a computer, will sort out those individuals who might be qualified for certain vacancies and notify them of that specific vacancy.

The student then is asked to write a letter of application to that particular school district about the job.

[854] For those teachers who are already employed or who have worked —

Q. You mean no longer in school?

A. They are no longer in school — they may be. It could be the teacher is anticipating a layoff or just wants to move, the teacher will then contact the placement office and ask that their credentials be reactivated.

At that time the teacher will update his credentials by filling in recent experience and may even solicit additional letters of recommendations and could even pull out some old letters of recommendation. His new letters of recommendation will probably be much more interesting to potential employers than those that he accumulated when he was still an undergraduate and had no teaching experience.

Q. Let me stop you for a minute and ask you this, is there any organized alternative from the teachers' standpoint other than going back to the university from whence they came and reactivate in their credentials through the recruiting office or the placement office?

A. Well, there are a few private placement agencies, and there are some — there is some access to the state — I think it's the Michigan Employment Security Commission. But those aren't used very much. The primary source of job information and credentialing for teachers is [855] through the colleges and university placement centers.

Q. In your experience, school districts in search of teachers commonly contact at least local universities?

A. It's almost — the universal source of that kind of information is through the colleges and universities.

Q. What if a teacher goes to school at Eastern Michigan or a student wants to become a teacher and he wants to teach in Wyoming, is it your experience that Eastern Michigan placement office would receive vacancy notices from the State of Wyoming?

A. Yes, they receive notices from throughout the United States, and also from foreign countries occasionally.

Q. What happens in the process once the placement office advises teachers or prospective teachers of the availability of given jobs; what happens next?

A. Well, the teacher — the way it works at Eastern, at our university, and it's typical — receives notice of vacancies and selects those that he wishes to follow up with.

He then is encouraged to write a letter of application to the school district. He may telephone, he may even visit. Students have told me they have gone to school districts even without invitation and visited, contacted the personnel official.

Then they will follow that up by asking that their credentials, a copy of their creden- [856] tials, be sent to the school district where they are applying. Sometimes they will ask the school district to request their credentials. The placement office is short of money, like all areas of the university, and they don't like to request the credentials unless there really is some interest in it, in the job.

Q. Let me ask you a question, the university sending out credentials, would that include certified transcripts of that student's work at the university, or could it?

A. It could, but generally these are not in the credentials.

Q. I'm not sure whether you were finished or not. Once the student makes contact or the teacher makes contact with an interested district, then how does the procedure continue?

A. Well, the person responsible for the personnel selection will take all of the applications and screen them down to the most viable candidates, and that list may be three or four, five people; and probably at that point then will request them to come in for an interview.

And after the interview, then they will make a decision as to which candidate they prefer. Typically, the school district then will contact — if this is a teacher who has taught — they will contact the school district personally where he is working or has been working for further information.

Occasionally a school official [857] will visit another community.

Q. What is the purpose of that inquiry, whether it is a visit or a contact to the place where the teacher currently works, what is the purpose of this contact?

A. The major purpose is, as I indicated, the credentials are completely in the control of the teacher. Everything that goes in there, the teacher determines what will be. Those people who read credentials often enough understand that. Therefore, they are seeking an additional source of information about the teacher that you are not going to get any other way, except by either using a telephone, writing a letter or making a visit.

Q. You have occasion to get contacted about former students of yours in the graduate school?

A. Yes, I do.

Q. As a part of that checking up process?

A. Yes, I do.

Q. Does the current state of the marketplace, the number of teachers looking for work versus the number of jobs, have any effect on the investigative process by a district trying to decide which teacher to hire?

A. Well, because there is a large surplus of teachers hanging in the market, school personnel directors can be very choosy, can be very selective. If you have a hundred applicants and you brought it down to half a dozen [858] who were very excellent candidates, you can be quite picky about the person you want.

So from the standpoint of employers today, this is a very good kind of situation if you are hiring new people. You really can get the best qualified person.

So if there is any question at all in the mind of the personnel director or the principal or superintendent or school board who is making the decision, they can throw that candidate out if there is any question.

You could not do that ten or twelve years ago because the job market was quite different.

Q. There were many more jobs than there were teachers?

A. Correct.

Q. Does a teacher's status in terms of being currently unemployed in the district as opposed to being laid off from a district, have any impact on his hirability by other districts?

A. A teacher who is laid off in a school district has the right to be recalled in that school district ahead of any new hires for positions for which they are certified or qualified. I mean, if the teacher is a football coach teaching physical education and a job is made available [859] to kindergarten and he is not certified for it, the school board is not required under the law to recall that person.

But if a vacancy occurs in physical education for which that laid off teacher is certified and qualified, the school board then would be obligated under the law to recall that teacher.

Q. I'm not sure you completely understood my question. Let me try and rephrase it. Let's assume you have a district looking at candidates to fill a position. If some of the candidates to fill that position are laid off from other districts, and some are not laid off from other districts, do these candidates who are laid off operate at any advantage or disadvantage [vis-a-vis] those that are not laid off candidates?

A. They probably have a disadvantage because the hiring district, knowing that that teacher can be recalled, might not — they would take that into consideration, obviously. And if they had a choice between a teacher who could be recalled and go to another district in favor of one they might not lose, they likely would prefer the one they want to stay around for awhile.

Q. You say one they might lose, do you mean if you hired a teacher on layoff, and they called back in his district, he might leave your district and go back from whence he came?

[860] A. Yes.

Q. Okay. That's why a laid off teacher is at a disadvantage over a teacher who is not in layoff status?

A. Of getting a job.

Q. Okay. Again, directing your attention to the year 1979, Professor, I would like you to assume a hypothetical teacher is certified in all subjects for the seventh and eighth grade, and is certified to teach science and English in ninth through twelfth grades; assume he has some ten years experience; in 1979 how would you characterize the job market for him to find a job as a teacher?

A. Well, it would be difficult, but it was not as difficult in 1979 as it is today. But it would be difficult in 1979.

With inflation and declining school enrollments, school districts are — many of them are in financial trouble. This has created some problems since 1979. But in 1979 we had a teacher surplus, there was a shortage of money, but not as crucial as it is today.

Q. Bad, but not as bad as 1982?

A. Right.

Q. Okay. Assume further this hypothetical teacher was sus-[861] pended from his teaching duties in later April of 1979 through the end of the schoolyear in June of 1979; assume further he was given a written reprimand in his personal file as reflected in Exhibit 12(A), the first two pages of the document I have placed before you; and assume further, Professor, that that teacher was the subject of media and newspaper publicity as reflected in Exhibits Six, Seven, Eight, Nine, Ten, Eleven, Fourteen, Fifteen and Nineteen; do you have an opinion as to the impact of those additional facts: the suspension, the reprimand and the publicity on this hypothetical teacher's ability to obtain a teaching position in the specific areas he is certified in in 1979?

A. This would very likely create a liability for the teacher.

Q. A minor liability, a serious liability; can you elaborate on that in any way or quantify the extent to which those assumptions create a liability for him in finding a job.

A. Well, as I testified earlier, if this information that I have in these exhibits was available to a hiring personnel officer, given the job market and surplus of teachers and the many excellent candidates available for the job, the personnel director would certainly turn away from a teacher with this history.

Q. Assume further the same hypothetical teacher is restored [862] to the classroom by Order of the Federal District Court in August of 1979 in connection with the pending Civil Rights

Action against his school board; assume that he teaches until January of 1982; and assume he is laid off for reasons unrelated to either the litigation or anything which has transpired in the past, do you have an opinion as to the prospects of that hypothetical teacher obtaining a job as a teacher in 1982?

A. His prospects of getting a job are going to be much poorer because of this history.

Q. Much poorer than in 1979 or much poorer than one who doesn't have that history, or both?

A. Both. Poorer than one who doesn't have the history, and poorer if he didn't have — it certainly would be poorer than it was in 1979.

Any laid off teacher today has a difficult job of finding placement.

Q. But a teacher with this kind of history has a more difficult job?

A. That's correct.

Q. Could you say substantially more difficult or slightly more difficult?

A. Well, it's hard to put a quantity on something like that.

Q. Well, let me ask —

A. I would say substantially more difficult.

[863] Q. Let me ask a related question this way. Do you think a teacher with that history might have a more difficult time of getting a job, or do you think he would undoubtedly have a more difficult time getting a job?

A. If the hiring officials have this information before them, they would probably turn the candidate down.

Q. What if they had, specifically with respect to the newspaper publicity, less than all of that, only a general knowledge of the

controversy but not nine or eleven or however many newspaper articles I gave you, does that make any difference?

A. Well, it makes a difference today because I don't take the chance on a teacher who has any blemish, even a minor blemish. You have such a large surplus, you can pick and choose and get the very best, why take a chance on a teacher with any blemish at all.

If you're a personnel director and you have to answer to the board of education, your superintendent, and you are going to hire a teacher with even part of this kind of information, you have to defend it. If you keep it quiet and it comes out, then your own job is in jeopardy as personnel director.

If he has any smarts at all, he is going to be careful about these kinds of things.

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[864] Q. In the current marketplace, if a Michigan School District hires a teacher who has tenure with another Michigan District, is there customarily any requirement for the serving of a probationary period in that new district?

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[867] A. Yes.

Q. A teacher would have to serve a year in a new district as a probationary teacher, even if he had ten years experience in a Michigan district somewhere else?

A. It's an option available to the local board to either grant them tenure immediately or require them to serve one year of probation.

Q. My question is in the current marketplace, is it customary in your experience that boards are requiring even experienced tenured teachers to serve a year of probation?

A. Yes, they are.

Q. Why?

A. Because of the large surplus of teachers. In the days when there was a shortage of teachers, school boards would offer tenure to an experienced teacher who had tenure in another district as an incentive to employ them. They don't need to do that today, they can require any new hire to serve a probationary period.

Q. One last question, Professor, if our hypothetical teacher obtains a job in 1982, would he likely be compensated for his years of experience?

A. School districts handle those things in a variety of ways. The most current prevalent way is the teacher, regardless [868] of experience or seniority in another district, or even in their degrees and training, will be placed in the salary schedule spot as if they were a new teacher who had never taught. If teachers stay in the same school district, each year they move up on a salary schedule, a term that is often used. So after ten or twelve years, they have moved up as a result of their experience into a higher salary level. But if they are laid off and leave the district and hire in another district, the board of education generally can place them at the bottom of this schedule as if they were a teacher who had never taught before.

Q. Was that true in 1979, considering the demographics of the marketplace in 1979?

A. Not as much as it is today, but it was still quite true, quite prevalent.

MR. HELDT: I have no further questions on direct examination, Your Honor.

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CROSS EXAMINATION

[869] BY MR. BERARDO:

Q. Professor Grinstead, you stated that you haven't been affiliated with the MEA since 1965, is that correct?

A. To the best of my knowledge, I have not been.

Q. Are you a member of a union at the present time?

A. No, I am an agent shop member to the AAUP.

Q. Excuse me?

A. I'm an agency shop member to the American Association of University Professors, but I'm not a union member.

Q. You are not a member, but you pay dues; is that what you mean to tell me?

A. I pay an agency shop due.

Q. Professor Grinstead, you stated that on the basis of those newspaper articles, that if they were disclosed to an employer they might impair prospects for employment, is that correct?

A. Yes, they might.

[870] Q. Now, except for the fact that you have been listed as a witness in this case, have you seen any of these articles prior to being listed as a witness, the articles that are in front of you?

A. I first saw these articles when they were shown to me by Mr. Ellman about two years ago.

Q. All right, Now, Professor Grinstead, you gave a hypothetical about a teacher and his prospects for employment, assuming that certain things were in his personal file and including a letter of reprimand; isn't that correct? Did you give a hypothetical answer?

A. Yes. Yes, I did.

Q. Now, assuming all the other assumptions in that hypothetical question being correct, assuming that the personal file contained no reference to a reprimand because the parties had agreed that it would be removed from the personal file, would that enhance the teacher's prospects for employment?

A. Well, it's very doubtful that the hiring official would see the personal folder or file in a local school district.

Q. Let's assume that a person such as in your hypothetical question is applying for a job, how would he ever find out about a reprimand if he didn't see the personal file?

A. Some officials in the school district where he received [871] the reprimand would divulge that information.

Q. What if there was an agreement that no such a disclosure would be made?

A. If it is a binding agreement and adhered to, then the disclosure wouldn't be known.

Q. Then in that case, would the teacher's prospects for employment be nearly the same as any other teacher?

A. No.

Q. Why not?

A. Because that's only one source of information that has been curtailed. There are other sources, and I am assuming that a personnel director would have access to those sources.

Q. Who would a personnel director contact first?

A. The other personnel director.

Q. If that other personnel director was aware of the agreement, he wouldn't disclose the information, would he?

A. Probably not if he has agreed not to.

Q. All right. Now, assuming that the conversation has taken place between the two personnel directors and there is nothing adverse in the file and no adverse comment is made about the reprimand or the suspension, will the personnel director from the district to which the teacher wants to move have any reason to look any further?

A. No more than any other candidate.

[872] Q. Professor Grinstead, you testified that the job market in Michigan is poor; is that correct?

A. That's correct.

Q. Is the job market for teachers poor everywhere in the United States?

A. It is not as poor in the southwest.

Q. Professor Grinstead, isn't it true that large numbers of Michigan teachers have moved to other states to find employment in teaching?

A. I don't know what you mean by large; some have, yes.

Q. Of those teachers who have been laid off in the past few years, is it not true that significant numbers of those teachers have moved to other states to find employment?

A. I would say that some of them have, I can't tell you it's a large number.

Q. Is the reason you can't tell me if it is a large number because you don't know what the number is?

A. That's correct, I think that's what I testified to earlier.

Q. Do you know how many teaching job openings are available in the State of Texas? Excuse me, do you know how many were available in the State of Texas at the beginning of the last schoolyear?

A. No, I don't.

Q. Do you know how many job openings for teachers are avail- [873] able in the State of Texas for the coming schoolyear?

A. No, I don't.

Q. Do you know how many job openings are available in the State of Florida for the coming schoolyear?

A. No.

Q. For the last schoolyear?

A. No.

Q. Don't you think that those kind of figures would be pertinent to your testimony today if you are testifying about restricted job opportunities?

A. That's hard for me to answer that. I didn't form the questions to be asked that way.

MR. BERARDO: I have no further questions, Your Honor.

THE COURT: Anything further, Mr. Heldt?

MR. HELDT: I have nothing, Your Honor.

THE COURT: Mrs. Truszkowski, anything further?

DEFENDANT TRUSZKOWSKI: No, Your Honor.

THE COURT: All right, you may step down, Professor. We thank you.

Testimony of Georgia Stachura
(Direct Examination)

[1083] *BY MR. HELDT:*

Q. State your name for the record, please.

A. Georgia Louise Stachura.

Q. You are the wife of the Plaintiff, Edward Stachura?

A. Yes, I am.

Q. How long have you been married, Mrs. Stachura?

A. Fourteen years tomorrow.

Q. You have two children?

A. Yes, we do.

Q. What are their names and ages?

[1084] A. Edward Jan the second is eight years old, and Kimberly Ann Marie is five years old.

Q. Are you employed at the present time?

A. Yes, I am.

Q. By whom?

A. I have two part-time jobs: one with the intermediate school district of St. Clair County and the other with the Western Area Special Education Programs in St. Clair County.

Q. What do you do in each of those jobs?

A. I'm a registered occupational therapist.

Q. What do you do as an occupational therapist for those two organizations?

A. I provide service to children who are mentally retarded, physical handicapped; children who have learning problems and perceptual problems in public schools.

Q. How long have you been doing that in these current positions?

A. Four years.

Q. At any time in those four years has your husband ever suggested that those children should have been killed or done away with?

A. Absolutely not, never.

Q. Have you had occasion to practice family nudity in [1085] your home?

A. No, sir.

Q. Have you ever?

A. No, sir.

Q. Do you recall the events of April of 1979 and thereafter as they pertained to your husband's employment?

A. Yes, I do.

Q. What's the first thing you remember, Mrs. Stachura?

A. The first thing I remember is the telephone ringing.

Q. Who was on the phone?

A. It was my husband, and he asked me if I would come to school and pick him up.

Q. And did you?

A. Yes, I did.

Q. Did you go alone or did you go with anyone else?

A. No, I had to first go to school and get our son from kindergarten and then go with him and our daughter to pick Ed up.

Q. How old was Kimberly at this time?

A. She was two.

Q. Did your husband explain to you why you had to go to school and pick him up?

A. On the telephone he said that he had been suspended, and I didn't really believe him. I couldn't — I had no idea why, and I asked him why. He said that [1086] he had been accused of violating community standards.

I asked him what that meant, and he said that he really didn't know, that people had been accusing him of some very bad things. And he asked that I come as quickly as I could to pick him up.

Q. How did he sound, was there anything in his voice that you detected the way he talked to you over the phone?

A. He kept assuring me that everything would be all right, which was a way of telling me that things weren't all right. I expected when he called that — to have him come home in the middle of the day, I thought perhaps he had had some physical injury, that he had fallen or been hurt in some way. And I never thought it was a suspension.

Q. When you arrived at the school, how did he look how did he act?

A. He was carrying a cardboard box full of papers and envelopes, and he had glisteny eyes. When he got in the car, he smiled and told us all hello.

Q. Did either of the kids say anything at this time?

A. Yes. Ed had many times in the past taken Eddie in to his classroom to show him what his daddy does, to show him what a schoolroom was. This was before he went to kindergarten. He had a very nice rela- [1087] tionship with his son, so Eddie asked if he could come into the classroom to meet the children and see his class.

Q. What, if anything, did your husband?

A. He said no, that today wasn't a very good day to go in.

Q. Did you discuss in the car on the way home at all what had happened or what would happen next?

A. No, we didn't.

Q. Why not?

A. It was such a serious matter that we did not really want to talk about it in front of Eddie, and at all upset him or alert him.

Q. Did your husband, when your arrived home that morning, make any phone calls?.

A. Yes, he did.

Q. What was the first call he made?

A. The first call he made was to our pastor.

Q. Did he make any other telephone calls that day when he arrived home?

A. I believe that he made, maybe, one or two to either union people or to the attorneys in Southfield.

Q. Did he remain in the home that afternoon or did he leave the house?

A. No, he left, he went to Southfield.

[1088] Q. Before he left, did you get any opportunity to discuss with him what had happened outside of Eddie's presence?

A. Only very briefly.

Q. What did your husband say to you, did he elaborate on anything that he had said on the phone?

A. Not too much. He didn't — in a way he wanted to protect us from all the things that he had heard or he couldn't really explain how. When I asked him how he had violated community standards, he really was unsure or he didn't really

know. And he kept saying that things would be okay, and tried to be encouraging.

Q. Were there any other events of April 24, 1979 that stand out in your mind?

A. Only that it was a day that felt like the world had absolutely fall in on us. When he left, I don't thing I've ever felt so alone or absolutely lost with no place to go in my whole life.

Q. Did you at this time, as of April 24, 1979, subscribe to the Port Huron Times Herald?

A. Yes, we did.

Q. Did you subscribe to or regularly receive any other newspapers?

A. We regularly bought the Review, and occasionally we [1089] bought the Mt. Clemens paper and the Detroit paper for the coupons.

Q. Okay. Did you receive any phone calls the afternoon of the 24th or thereafter regarding what had transpired at school?

A. Not on the 24th

Q. When did phone calls start arriving?

A. The next morning.

Q. What kind of calls were these?

A. We had some calls that were supporting from parents of students that said we don't believe this, we feel that Ed is a very good teacher and we know that what's being said cannot be true. We had calls where people would begin to swear. We had news media call, and papers and radio and television.

Q. Did you answer all these calls or screen them all?

A. I took quite a few.

Q. Did you relay the substance of any of them to your husband?

A. Sometimes I did, sometimes I didn't.

If they were very derogatory, I didn't tell him about them. I didn't feel that he needed to know. He felt absolutely — so bad as it was. He just didn't need to know any more.

Q. Did he sometimes take calls himself?

[1090] A. Yes, he did.

Q. Were they sometimes apparently derogatory or nasty calls?

A. Yes.

Q. How could you tell when your husband answered the phone?

A. It would be a very brief call, and he would try to get their name and it would usually just end right away and then he would come back and he would say: Well, there's another prank call.

Q. How long did these calls continue?

A. We still get them.

Q. Did they slow down in volume as the days or weeks went on?

A Yes, they did. They seemed to pick up every time there was any notification that the trial would start and we would get another flurry. Usually those are just the prankster recalls.

Q. Going back to the week of April 23, 1979, as best as you can recall, how many calls would you say you received of any of the type you have described that week.

A. The number I couldn't tell you, I could perhaps tell you this way: On the day after, my two year old was upstairs in the

bathroom and I didn't know she was [1091] in the bathroom. The phone would ring. I would answer it, hang up, it would ring again, I would answer it, hang up.

I turned around one time to go upstairs, and water was coming down through the ceiling. My little girl had been playing in the bathroom sink and water was all over the floor and running through the kitchen sink. I had been on the phone so long that I didn't have any chance to get up there to take care of her.

Q. I see. Do you have parents who live in the metropolitan Detroit area?

A. My parents lived in Mt. Clemens at the time.

Q. Did you make any effort to contact them when these events occurred?

A. I had intended to. Unfortunately, my father heard the 12:00 o'clock noon report on television that Ed had been suspended.

Q. So she contacted you?

A. Yes, she contacted me before I could contact her.

Q. Had you discussed prior to that time, with your husband, contacting your parents first, if possible?

A. I beg your pardon?

Q. Had you, prior to your mother contacting you, talked to your husband about trying to contact your parents [1092] before they learned about this elsewhere?

A. Yes. We wanted to let them know as soon as we could, we wanted to let both parents know.

Q. Did you have occasion to contact your husband's parents?

A. No, we didn't. Ed's father had one kidney removed due to cancer in '74 and he had high blood pressure, we wanted to

meet with him face to face so we could present it and watch his reactions and know how to talk to him. But before we could get there, he read all about Ed in the Free Press, Sunday Free Press.

Q. In terms of your husband, was there any visible reaction? Did he say anything when your parents and his parents both contacted you regarding the events at the School Board Meeting on the 23rd of April?

A. He felt very, very sorry that he was putting any of us through all the tension and worry and concern. And he apologized. He told them he was sure it would all work out when everyone knew all the information.

• • • •

[1093] [Q]. During the week of April 23, 1979, did your husband express to you any attitude about the phone calls, the ringing of the phone itself?

A. We were eager for the phone to ring, we were waiting and waiting for the call to come that would say we checked these things out, we know that they are not true; welcome back to school.

Q. Did that call ever come?

[1094] A. No, sir, it never did.

Q. Including the second week following the school board meeting of April 23, talking over a couple weeks period of time, how did your husband occupy his time, what did he do during the day, every day?

A. He said that it was very important that we try to keep on as much of a routine as we could. We took our son to school and picked him up, and he paced the floor, he would go outside for a minute and come back in and ask if anyone had called.

Finally, he decided that he had to do something with all the tension that he had, so he took down the tree in our yard. He took out a sailboat that was a sandbox and buried in the ground and he dug that up.

The highway department was putting in curbs to make access for the handicapped easier, and he asked one of them that was driving the tractor to dump a huge load of cement, heavy cement in our front yard, and he brought a sledgehammer and every morning he would go out and work all day, break the cement into fine little pieces and haul them to the back.

Q. Where did he put them in the back yard?

A. He put them in the driveway.

[1095] Q. Where did your husband sleep at night?

A. He slept on the living room floor.

Q. Why?

A. He was very, very resless; he couldn't sleep and if he did sleep, he had tremendous nightmares. He would cry out in the night.

And since we had a young child, in order that I might rest, he slept on the floor downstairs.

Q. How long did that go on?

A. He still sleeps on the floor sometimes.

Q. Prior to the events of April of 1979, did your husband go to church regularly?

A. Yes, he did.

Q. Did he go regularly following the events of April of 1979.

A. No, his attendance started to decline the longer that time went on.

Q. Did he ever indicate to you why or express to you any — give you any indication as to why he no longer desired to go to church?

A. Yes.

Q. What did he indicate?

• • • •

[1096] A. Well, the longer that this went on unresolved, the more guilty he felt, the more shameful he felt, until finally he felt almost too dirty to go to church.

Q. Did you talk about any of these feelings?

[1097] A. Yes, I did. I tried to encourage him.

Q. Did that have any apparent effect on his feelings or his attitude?

A. No, he would refuse to go just — a common courtesy of someone asking him how are things, that made him remember all that he was going through. It wasn't just the little pleasantry of the weather or anything, but it brought it all right back to his heart again.

Q. Did he express to you at any time the concern for the family and its future?

A. Yes, he did.

Q. What did he say, how did he express that concern?

A. He said that he felt he had tremendously let us down, that he did not know how he was going to be able to support his family. He saw the future of his children, and it did not look good to him at all; it looked very, very bleak.

Q. Did the children notice he was home all day and not at work?

A. Our son did, yes.

Q. Did Eddie say anything about that?

A. Yes. He asked why he was home and why he had to go to school if daddy was home, if it was a special vacation or something that he didn't have at his [1098] school.

Q. What did your husband say to Eddie about that, if anything?

A. He tried to present it to him that we all had our jobs to do, and that Eddie's job was to go to school and be the best little boy that he could, that he was representing the family. That right now, daddy had to stay home.

Q. Let me direct your attention, Mrs. Stachura, to exhibit number 11, a letter dated May 3, 1979 from Mr. Russell to your husband. Do you recall the arrival of that letter in your home?

A. Yes, I do.

Q. Did your husband have any visible or verbal reaction when that letter arrived?

A. Well, he had had some hope that this was all going to be cleared up. And when he got this letter, he started to doubt that anything was ever going to be done.

Q. What effect, if any, did the events of April 23 and the events that followed have, if any, on your husband's relationship with his children?

A. He was very short tempered with them. He would scold Eddie for little things that really were a very small matter, and then later after he had some [1099] time he would go back and apologize to Eddie for his actions or behavior.

Q. Had he been like that prior to April of 1979, short with his son?

A. No.

Q. Let me direct your attention to exhibit 12(A), the letter of reprimand dated April 20 of 1979; do you recall that letter arriving in the home?

A. Yes, I do.

Q. Did you see it yourself?

A. Yes.

Q. Do you recall approximately when that was?

A. It would have been in May.

Q. Was it after or before your receipt of exhibit 11, the letter from Mr. Russell dated May 3?

A. It was after.

Q. Did your husband either verbally or in some other manner indicate any reaction to you, any feelings about that letter of reprimand?

A. Yes, he did.

Q. What, what did he indicate to you?

A. He basically felt that this was all inaccurate, that it was untrue or half-true; and that he could not accept it, that it was absolutely wrong.

Q. Did he propose to you or say anything about talking [1100] to reporters, going to the news media?

A. Yes, he was very angry at one point and said that he should call all the reporters together and tell them what happened, because no one had heard his side of the story at all.

Q. Did he do so, did he make arrangements to talk to all the reporters?

A. He didn't no. He said that it is not the way to handle a problem between people.

Q. Following his receipt of this letter of reprimand, was he invited to resume his teaching duties at the Middle School?

A. No, he was not.

Q. Did he express to you any concern about that?

A. Indeed he did.

Q. What did he say to you, how did he express concern?

A. He felt the quickest way to end the rumors and gossip was to have a chance to confront the students again, but he never had that chance.

Q. Let me direct your attention to exhibit number 31, a letter dated July 2, 1979 from the Grievance Committee of the Board of Education, addressed to your husband; do you recall the arrival of that letter in the Stachura home?

A. Yes, I do.

[1101] Q. At or about its date?

A. Yes.

Q. Did your husband have any visible or verbal reaction on receipt of that letter?

A. He was deeply, deeply upset. He had told him that, in fact, he had not been suspended, with the hope of ever getting back into the classroom; but that he had been fired.

Q. Did your husband work, have a paying job in the summer of 1979?

A. He worked for one day as a bartender?

Q. Did he work for the boy scouts that summer?

A. He worked for the boy scouts in the summer of 1980.

Q. Not in 1979?

A. No, sir

Q. When did you begin looking for employment?

A. About in June in 1979 when it looked like Ed was not going to be working the fall, and we had no income for our family.

Q. When did you actually start working on your current job?

A. The end of August, 1979.

Q. Did your husband express to you any feelings about your looking for work in the summer of 1979?

[1102] A. Yes, he was really hurt by having to leave the children and do what he felt he should he should be doing, supporting the family.

Q. In the fall of 1979, your husband returned to teach at the Memphis High School under order of the Federal District Court; did he express any feelings to you about going back to school that September?

A. Yes, he did.

Q. What did he express to you?

A. He was still under a cloud, he was still a marked man, he was afraid, somewhat intimidated. The Sunday night before school started, he had thoughts of getting out of teaching, that it was more than he could handle.

Q. As the 1979-80 school year went by, did he become, in your judgment, his old self as far as his feelings about work?

A. No. His whole spirit for teaching changed. He, in the past, has always looked at young people as the future, as future presidents, future doctors. He always wanted his students to be the best prepared that he could make them for their next year.

And that year he went in, he did his job and came home and there was no joy.

Q. Did your husband participate in any extracurricular [1103] activities in 1979-80.

A. No, he didn't.

Q. Had he prior to that time, prior school years?

A. Yes, he had.

Q. In December of 1979 or January of '80, did you learn of the Esquire Magazine dubious achievement award which your husband won?

A. Yes, I did.

Q. How did you learn about it?

A. He came home and told me what had happened today, that he had taken away an article from — or a magazine from students that were waving it around the classroom, and it was absolutely humiliating.

Q. Your husband also taught at the high school in the fall of 1980, did he not?

A. Yes.

Q. Were any of his students in the fall of 1980, the same students he had had in the spring of 1979 in the life science class?

A. Yes, he had some of the same students.

Q. Did your husband at any time in the fall of 1980 or in August of '80 before that school year started, did he express any concern or feelings to you about going back to face students that he had been teaching in the spring of 1979 when he was suspended?

[1104] A. Yes.

Q. What did he say to you, what did he indicate?

A. For him, that was one of the hardest teaching days that he ever had. It was different from his first teaching day that had joy and anticipation in it and that year he faced children who had not always been honest. He still had all the allegations and wild rumors there, they had never been taken away and he felt terrible about it.

Q. Other than phone calls, did any other unusual or crank kind of events occur following the events of April of 1979?

A. Yes.

Q. Like what, give me an example or an incident.

A. We've had a dead cat left on our stairs, we've had a heaping gallon of potato salad dumped in front of our door.

Q. When did those events occur?

A. That was this year, before this trial.

Q. Your husband was laid off in January of this year, is that correct?

A. That's correct.

Q. How did he react to that layoff?

A. He felt that they had finally won, that they had finally gotten him out of school.

[1105] Q. Since January of this year, has he expressed any concern to you about his ability to pursue his profession elsewhere?

A. Yes.

Q. What has he said, or what has he indicated to you?

A. He doesn't feel that he can ever teach again, that he is probably finished as a teacher.

Q. During the last three years, since April of 1979, did the two of you ever give any thought to moving away from Michigan?

A. We talked about it.

Q. Why haven't you moved?

A. We haven't done anything wrong to run away and moving would seem that we are running away.

MR. HELDT: I have no further questions on direct examination, Your Honor.

THE COURT: All right. Mr. Berardo or Mr. Mooney?

MR. BERARDO: Thank you, Your Honor.

* * * *

COURT'S INSTRUCTIONS TO JURY

[1836] THE COURT: All right, we'll bring the jury in. (Whereupon the jury was returned to the courtroom and the following took place in open court:)

THE COURT: Now that you have received the evidence and heard the arguments of counsel, [1837] it is my duty to give you the instructions of the Court as to the law applicable in this case.

I would prefer presenting these instructions in a leisurely and conversational manner, rather than having to read them to you, but that just is not possible. As you will discover, the instructions are of fairly great [length] and cover many issues; issues which the Court must instruct on [sic] both accurately and completely; and for this reason resort must be had to instructions which are prepared in advance.

* * * *

[1881] I will now instruct you on the subject of damages.

You will be asked to make separate decisions with respect to Plaintiff's liability claims and with respect to damages. The first decision is whether any of the Defendants are liable to the Plaintiffs. If you find liability, the second decision is the amount of damages to be assessed. These are separate questions.

The fact that I will instruct you on the proper measure of damages should not be considered as an indication of any view of mine as to which side is entitled to your verdict in this case. Instructions as to the measure of damages are give only for your guidance in the event that you should find in favor of Plaintiffs on the question of liability by a preponderance of the evidence and in accordance with my previous instructions.

Plaintiff James McDonald is not seeking money damages of any kind in this case. Therefore, you will be asked only to make a decision as to Plaintiff James McDonald's claim of liability against the Defendants in this case.

[1882] Therefore, the instructions which follow, dealing with the subject of damages, apply only to the two liability claims of Plaintiff Edward Stachura.

The allegations of the Complaint as to the amount of damages Plaintiff claims to have suffered are not to be considered, except that the damage claimed does fix a maximum limit, and the jury may not award Plaintiff more than the amount claimed. In this case, the Plaintiff's Complaint claims $500,000.00 in compensatory damages, and $500,000.00 in punitive damages.

Damages must be reasonable. If you find that the Plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury and damage as you find from a preponderance of the evidence in the case that he sustained as a proximate result of the Defendant's violation of his civil rights.

You are not permitted to award speculative damages. This means you are not to include in [any verdict] compensation for loss which, although possible, is remote or conjectural, or which has not been p

If you sh. uld find that the Plaintiff is entitled to recover damages, th. object of placing the Plaintiff in the same position he ·voulu be in if his civil rights had not been violated, should guide you in your determination [1883] of the amount to be awarded. You should consider in this regard a.ıy lost earnings; loss of earning capacity; out-of-pocket expenses; and any mental anguish or emotional distress; that you find the Plaintiff to have suffered as a result of conduct by the Defendants depriving him of his civil rights. Although the injury producted [sic] by mental anguish or emotional dietress is essentially subjective, genuine injury in this respect [may be] evidenced by the conduct of a person, and observed by others.

Damages of the type just described are called compensatory damages.

In addition to compensatory damages, the law permits the jury under certain circumstances to award punitive and exemplary damages, in order to punish any wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. However, in cases under 42 USC 1983, punitive damages are not recoverable against municipalities. The term "municipalities" includes such organizations as the Board of Education of the Memphis Community Schools, but not the individual members or agents of the Board.

If you should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages, and should further find that the act or omission or any of the [1884] individual Defendants which proximately caused actual damage to the Plaintiff was

maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they choose so to do, add to the award of actual damages against any individual Defendant such amount as the jury shall agree to be proper as punitive and exemplary damages.

An act or failure to act is "maliciously" done if prompted or accompanied by ill will, or spite, or grudge toward the injured person.

An act or a failure to act is "wantonly" done if done in reckless or callous disregard of or indifference to the rights of the person damaged.

An act or a failure to act is "oppressively" done if done in a way or manner which damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make an award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first award the Plaintiff a verdict for actual damages. The [1885] jury should also bear in mind, not only the conditions under which the purpose for which the law permits an award of punitive damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded or fixed in amount because of any sympathy or bias or [prejudice] with respect to any party to the case.

If you find that the Plaintiff is entitled to a verdict in accordance with these instructions, but do not find that the Plaintiff has sustained substantial damages, then you may return a

verdict for the Plaintiff in the sum of one dollar. Such an award would be called "nominal" damages.

The award of a nominal sum rather than compensatory damages would not preclude your awarding punitive damages in such amount as you deem appropriate, if you find that the award of punitive damages is justified under these instructions.

If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much [1886] compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

* * * *

[1888] I will give you a copy of these instructions for your use while deliberating. They are available to each of you. If you have questions about the law or your duties as jurors, you should consult the copy of the instructions as given to you.

* * * *

OBJECTIONS TO JURY INSTRUCTIONS

[1898] You are excused to pick a foreperson, and we'll call you right back.

(Whereupon the jury was excused from the Courtroom.)

THE COURT: Mrs. Truszkowski and gentlemen, this is the time set under Rule 51 for counsel to make any objections to or suggestions for consideration to the Court's instructions as given. Mr. Heldt?

MR. HELDT: The Plaintiff would object, for the record, to the Court's failure to give our requested instruction number 22, as well as our requested instruction number 38 and number 41.

We would also object to the Court's instructions as contained on pages 44, 45 and 46 of the instructions you just read.

I won't unless the Court desires me, elaborate further. We discussed that in Chambers this morning, and I think the Court understands our feelings, as well as we [1899] understand the Court's position in this regard. I don't propose to fill the record up with further discussion, unless you desire it.

THE COURT: The Court understands you object to the Court not defining the word voluntary; is that correct?

* * * *

[1903] THE COURT: Mr. Mooney or Mr. Berardo?

MR. MOONEY: Yes, Your Honor. We have a number of objections, a few more than Mr. Heldt, although compared to the number of instructions, relatively few objections.

Many of these pertain to issues we have raised before by this Court after the Court has, in fact, rejected at some course in the proceedings.

* * * *

[1911] MR. MOONEY: Thank you, Your Honor. We're nearly to the end, if I may persevere.

The Court's instruction on page 72 [transcript pages 1885-86], I believe, asks the jury to speculate as to the value of the Constitutional right. I believe the Court in Carey versus Piphus, 435 US 247 indicated nominal damages were an appropriate measure of the deprivation of, at least in that case, a First Amendment right unless there was a showing of actual damages.

It seems to me the Court's instruction given on page 72 asks the jury to speculate as to what the value of the Constitutional right is. I don't think that's appropriate under the decision of the Supreme Court, and we object to the giving of that instruction.

THE COURT: The Court's instruction relied directly on these two cases, Herrara versus Valentine found at 653 Fed 2d, page 1220, specifically the language at page 1227, an 8th Circuit case decided in 1981; and Corriz [1912] versus Naranjo, 667 Fed 2d, page 892, a 10th Circuit case decided in 1982.

* * * *

JURY'S ANSWERS TO SPECIAL INTERROGATORIES

* * * *

[1924] THE COURT: The Court will ask the clerk to read aloud the verdict.

CLERK FOSTER: In the case of Edward Stachura, et al, versus Memphis Community School District, et al, part I: Plaintiff Stachura's First Amendment Claim, question 1: Do you find that Plaintiff Edward Stachura's First Amendment rights, as previously defined in these [1925] instructions, were violated by any or all of the Defendants?

Answer: Yes.

Question 2: If your answer to question 1 was yes, which Defendants do you find violated Plaintiff Edward Stachura's First Amendment rights?

Those indicated are as follows: The School Board, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Beatrice [sic] Dolan, Donald Russell, Delores Truszkowski.

Part II: Plaintiff Stachura's Due Process Claim. Question 3: Do you find that Plaintiff Edward Stachura was entitled to due process on the basis of a property interest as previously defined in these instructions?

Answer: Yes.

Question 4: Do you find that Plaintiff Edward Stachura was entitled to due process on the basis of a liberty interest as previously defined in these instructions?

The answer is yes.

Question 5: Do you find that Plaintiff Edward Stachura was deprived of due process by the Defendants?

Answer: Yes.

Questions 6: If your answer to question 5 was yes, which Defendants do you find were responsible for depriving [1926] Plaintiff Edward Stachura of his right to due process?

Those indicated are as follows: The School Board, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Beatrice [sic] Dolan, Donald Russell and Delores Truszkowski.

Part III: Plaintiff McDonald's First Amendment Claim. Questions 7: Do you find that Plaintiff James McDonald's First Amendment rights, as previously defined in these instructions, were violated by any or all of the Defendants?

The answer is no.

Part IV: Damages. What is the amount of nominal or compensatory damages which you award Plaintiff Edward [St]achura for the deprivation of his rights under 42 USC 1983?

As to the School Board, the amount indicated in compensatory damages [is] $233,750.

Mr. Herbert Kubisch, as to compensatory damages, $8,250.

As to Genevieve Walters, the compensatory damages is $2,750.

As to Margaret Guoin for compensatory damages, $2,750.

For Timothy Kelley as to compensatory damages, $2,750.

[1927] As to Mr. Ernest Beaudrie, $2,750.

As to Beatrice [sic] Dolan, $2,750.

As to Donald Russell, $8,250.

As to Delores Truszkowski, $8,250.

Question 10: What is the amount of punitive damages which you award Plaintiff Edward Stachura for the deprivation of his rights under 42 USC 1983?

For punitive damages as to Herbert Kubisch, $15,000.

As to Genevieve Walters, $1,000.

As to Margaret Guoin, $1,000.

As to Timothy Kelley, $1,000.

As to Lawrence Delekta, $1,000.

As to Ernest Beaudrie, $1,000.

As to Beatrice [sic] Dolan, $1,000.

As to Donald Russell, $10,000.

As to Delores Truszkowski, $10,000.

Signed Charles C. Bailey, Foreperson.

EXHIBIT 6

Memphis teacher investigated

Parents irate about sex education

By MARY HARRIS
Times Herald Reporter

MEMPHIS — A seventh-grade science teacher has been relieved of his teaching duties, pending an investigation into charges of improperly teaching reproduction classes.

About 25 parents heatedly complained about the sex education classes during a special school board meeting Monday night. School Superintendent Donald Russell said a substitute will conduct Edward Strachura's classes until further notice.

Parents said they weren't notified that their children were being taught reproduction in science class, that Stachura was injecting his personal values into sexual discussions, that he was using unsuitable materials for discussions, and that he has some objectionable characteristics.

"I just haven't gotten over the very horrid shock of this," Stachura said today. "I'm shocked, appalled and very hurt."

Stachura said he would not comment on the charges until he receives legal advice. He did not attend Monday's meeting.

In a letter read to the board Monday, several parents complained that Stachura made students look at graphic photographs of his wife giving birth. They said he made fun of students who didn't want to look.

The letter said Stachura discussed the moral aspects of sex and interjected into classes his views of venereal disease, breast-feeding and other subjects. One parent said Stachura

counseled students not to tell their parents if they contracted venereal disease.

A black woman said the teacher had told a child to come and ask her whether breast milk from black women was white or chocolate-colored.

Parents also said he frequently touched female students.

They said Charles Becker, middle school principal, had not been responsive to complaints.

"When I saw Mr. Becker, he tried to smooth things over," one woman said.

"They both should be tarred and feathered and sent out of town," one father suggested.

Board President Herbert Kubisch said he sympathized with parents and would not send his children to class in a similiar situation. A threatened boycott of Stachura's classes was headed off by Russell's statement that Stachura would be relieved of his duties until the matter is resolved.

Russell said the problem was drawn to his attention Friday, and Stachura already has had one disciplinary hearing. A letter of reprimand is being prepared, he said.

A second hearing will be held this week, Russell said. A committee composed of parents, school board members and a teacher union representative also will investigate.

Stachura has been teaching for 10 years and has taught the seventh grade science for three years, Russell said.

EXHIBIT 7

IT'S A MAD, MAD WORLD

MEMPHIS, Mich. (UPI) — Parents' complaints have prompted school officials to suspend a seventh grade science teacher for allegedly showing students pictures of his wife having a baby.

Edward J. Stachura was removed from his class room at the Memphis Middle School when 40 parents showed up at a school board meeting in protest.

* * * *

ALBUQUERQUE, NM (UPI) — A young woman left waiting at the altar wants her bridegroom back — behind bars.

"I found he's done this to five other girls," the erstwhile bride said yesterday.

The woman asked police to help her find the fiance after she said he took a $1500 diamond ring and a motorcycle he bought with $1100 of her mother's mother.

EXHIBIT 8

2 A—THE DETROIT NEWS
—Wednesday, April 25, 1979

Keeping Up

City/Suburbs/State

News summary for April 25 with index to additional details

A SUSPECT is under arrest in connection with the attempted abductions yesterday of four young people near schools in the Battle Creek area. Police said a tip on a license plate number led them to a 27-year-old Coldwater man who was arrested last night for investigation.

A VAN BUREN COUPLE contend that a bank's failure to honor a check for $2.95 caused them $3 million worth of embarassment. Thomas C. and Billie Joe Welty filed the suit against

THE CHILDREN'S ZOO on Belle Isle in Detroit will not be open this summer. The old zoo was torn down to provide room for a new and larger facility, but construction of the new zoo is not expected to be completed until late fall. Page 1B.

A TEACHER has been suspended while officials investigate his methods of teaching sex education. Parents complained that the Memphis, Mich., teacher forced his students to look at photographs of his wife during childbirth.

EXHIBIT 9

Memphis parents decry sex education in seventh grade class

By ROSEMARY OTZMAN
REIEW Editor

MEMPHIS — Although it wasn't on the agenda of Monday's special school board meeting, about 20 parents stayed after the meeting was adjourned to lash out at the sex education being taught by a seventh grade middle school teacher.

Dolores Truszkowski said that she was the spokesman for the group, which had complaints about the middle school in general and the science teacher in particular.

Although Edward Stachura's name was only mentioned once during the session, the group spoke vehemently against "the teacher".

Truszkowski, in a letter she had written to present to the board, charged that:

- Two movies shown to seventh graders — one to boys and one to girls — was not previewed by local officials. School Supt. Don Russell said that the films have been shown for about 30 years and are approved by the County Health Department. The updates are not previewed by local officials.

- The teacher spent six weeks on the chapter of reproduction, when he only spent one week on the digestive system. She also said that he showed pictures of his wife having a baby and made fun of one child who did not "want to watch".

- Put sexual drawings on the chalkboard and explained his own morals about nudity, abortion, venereal disease and breast feeding.

- He was infringing on the moral teachings of families.

Members of the audience said that when parents complain ed about the teachings, their children were hasseled [sic].

One man suggested that both Stachura and Middle School Principal Charles Becker be tarred, feathered and thrown out of town.

School Board President Herbert Kubisch, after hearing the charges, commented, "I wouldn't let my kid go to that class."

This encouraged a suggested boycott of the class, which became unnecessary when Supt. Russell said that a substitute would take over the classes until the matter was settled.

Russell said that the complaints formally came to h- atten- tion last Friday and the formal process, required by law and contract, was begun. A letter of reprimand was written.

"He's had one disciplinary hearing and on Wednesday at 3 p.m. the letter will be presented to him, Russell said. When asked if this would be an open meeting, Russell replied it wouldn't.

"A man can't be drawn and quartered" without getting all the facts, Russell said. He said before a teacher can be dismissed there must be grounds that would hold up before an arbitrator and a court.

The public was promised a resolution to the problem at the next regular meeting of the school board on May 21.

Kubisch set up a committee of parents to meet with him and school officials to further discuss the charges and seek a remedy. Committee members are Dolores Truszkowski, Bev Owens, Marilyn Moore and Mary Jeffery.

Stachura said Tuesday morning that he was surprised at the charges and could not reply until he was better informed on what was happening.

Only one parent spoke on behalf of Stachura at Monday's meeting, which was stacked with dissenters as the result of a Monday telephone campaign. She said that the teacher has a tin can on his desk that he uses for students who want to ask a question, but are too embarrassed to say it out loud. He had two cans full of questions to answer.

"I think that maybe the parents have fallen down," she said. "If the students dislike him as much as the parents say they do, why did they want to ask THAT MAN those questions?"

EXHIBIT 10

Teacher suspended
in sex ed controversy

By CHARLES THOMAS
Macomb Daily Staff Writer

MEMPHIS — A seventh-grade teacher has been suspended from his job in this rural northern Macomb County community until an investigation can be completed by school administrators into his teaching techniques in a class on human reproduction.

Edward Stratura was suspended with pay at a special meeting of the Memphis School Board Monday after angry parents showered the school board with complaints. Stratura has been employed with the district for two years teaching science and mathematics at the Middle School.

Parents allege Stratura dwelled too long on a unit in the district's new science textbook which details human reproduction. They allege that he showed students photographs of his own child's birth and drew pictures on the blackboard of sexual intercourse.

They also accused him of promoting in the classroom his own ideas on abortion and masturbation. When parents told board members they would have their children boycott the class, Superintendent Donald C. Russell suspended Stratura.

"I don't want any of my children in this classroom," said Mrs. Marilyn Moore, who has a daughter in the class. "I appreciate the magnitude of what we are doing and that he (Stratura) is a family man but I am worried about what the class will progress to next."

Russell refused comment on the suspension, saying it is a "confidential problem." He said allegations by parents were made unexpectedly at a special meeting of the school board.

Stratura was contacted at his Richmond home by The Macomb Daily but refused to comment on the allegations citing legal ramifications. However, Memphis Education Association Vice President Florence Beaudrie defended Stratura's teaching strategies.

Teacher's sex ed backfires

Continued from Page One

"He is an extremely dedicated and demanding teacher," she said. "Perhaps the parents are so upset because he is so demanding."

She pointed out that Stratura used the same teaching techniques during the last school year and there was no criticism by parents. According to Mrs. Beaudrie, the photographs of the delivery of his child were used after students questioned him about labor prior to childbirth.

"The pictures drawn on the blackboard were merely enlargements of the textbook pictures," she said. "A nurse was at the school board meeting and said she found nothing objectionable about the pictures in the textbook."

However, parents also complained that Stratura made racial jokes in the classroom and promoted what they term "free love." They also said he ridiculed students who refused to look at the pictures of his wife's childbirth.

Board president Herbert Kubisch said Statura had no authorization to conduct sex education courses in the classroom. "We cannot dismiss him summarily because he has tenure," said Kubisch. "But when 40 parents show up and

make these kinds of allegations, we can't sit on our hands and ignore it."

Adding to the parents' anger was the school administration's apparent inaction when the problem was first brought to them.

The community has a population of black families, who complained to the administration that Stratura allegedly made some racial jokes during class. When parents of white students complained about the teaching methods, they were allegedly told by the administration that no other complaints had been received against Stratura. Both groups were represented at the school board meeting.

The Michigan Education Association has not filed a grievance over the matter because the administration has not violated the contract — Stratura has not been demoted and he is still being paid. However, the suspension has been turned over the MEA's attorneys for consideration.

"Nothing like this has happened in the 23 years that I have been a teacher in the district," said Mrs. Beaudrie. "The parents are reacting to hearsay from their children."

She also suggested that some members of the community may be riding the issue into a seat on the school board — elections are in June.

Exhibit 11

[Letterhead Omitted in Printing]

May 3, 1979

Mr Edward Stachura
69782 Main St.
Richmond, MI 48062

Dear Mr. Stachura:

At the conclusion of a meeting held on Monday, April 23, 1979, a group of parents submitted a list of charges to the Board of Education related to your teaching. As a result of the reading of those charges, you were suspended with pay, until an investigation of those charges could be made. That investigation is still continuing.

I will keep you informed as to the progress of that investigation and will notify your association and you of the time and place when further discussion is to be held.

If you have any questions, please contact me.

Sincerely,

/s/ DONALD C. RUSSELL

Donald C. Russell
Superintendent

seo

Exhibit 12A

April 20, 1979

Mr. Stachura:

There are several areas of concern developing over the presentation of the 7th grade science unit on reproduction during March 12 — April 17. A meeting with parents on April 19th, from 3:30 p.m. — 6:30 p.m. brought out the following concerns. Parents objected specifically to the following:

1. Personal pictures of natural childbirth.

2. Personal statements of family nudity and bathing.

3. Questionable eye and facial movement dealing with an aide coming into your classroom.

4. The use of the word insertion in a questionable manner.

5. Has the reputation of the "The Sex Maniac" among the students.

6. A put down to kids that do not wish to participate.

7. The use of a question box and answering all of the questions.

8. Offering students of this age different life styles from their family styles.

9. An insensitivity to community mores of what is appropriate for 7th graders.

By offering more material and in greater depth than the textbook intended and by failing to check first with the building principal, Superintendent, and the Board of Education for final approval, you have violated Part 3 and 4 of the management rights clause in our master contract.

The degree of insensitivity exhibited, reflects upon you as a classroom teacher, the building principal as your immediate administrator and our school in general.

I had talked in length with Mr. Stachura approximately three weeks ago about a question that came up over this unit. It was a question dealing with milk from breast feeding. The question was dealing with the color of milk from black women. At this time, I talked with Mr. Stachura about not delving into areas of a sensitive nature, and explained to him that as an example, he should simply not try and answer any questions of a delicate nature. Prior to the unit test, I had another occasion to talk with Mr. Stachura about the context of the text unit and the areas covered in class. I expressed concern over the type of questions that might be on the unit test. Upon going over the test with him, I was assured that the test shown to me was on the material in the book. In both meetings with Mr. Stachura I stressed the necessity of being very careful about dealing with the subject objectively.

My suggestion was that if a question or any phase of any question dealt with a sensitive or personal nature, *do not* answer the question and simply state to the class that it was not an appropriate question to answer or discuss in a public school situation.

At this point I was told to put the letter of reprimand on hold because of Mr. Stachura being put on suspension.

After correspondence from Mr. Thomas, school attorney, I was directed on May 9th, to complete the letter of reprimand.

May 10, 1979: To insure against this occurring again, the administration states again that Mr. Stachura cease and desist each of the specific things that are objectionable. The administration shall also stipulate a clear definition to Mr. Stachura as to what he can and can NOT teach in the area of reproduction or any other controversial area of subject matter.

Daily lesson plans will be submitted and initialed by the principal after approval, and that his curriculum shall conform explicitly. Administrators shall determine the weight and sufficiency of time on unit and insist that Mr. Stachura deliver his curriculum exactly in compliance with the predetermined time table and content.

Sincerely,

/s/ CHARLES W. BECKER

Charles W. Becker
Middle School Principal

CWB:iw

EXHIBIT 14

PACIFIC STARS AND STRIPES
SATURDAY, APRIL 28, 1979

Class out for Michigan teacher

MEMPHIS, Mich. (UPI) — Parents' complaints have prompted school officials to suspend a seventh-grade science teacher for allegedly showing students pictures of his wife having a baby.

Don Russell, superintendent of the rural district, has confirmed that Edward J. Stachura had been removed from his classroom at the Memphis Middle School.

Russell said the action was taken strictly "to protect his (Stachura's) rights," adding that the teacher was still receiving his pay.

No charges have yet been filed against the teacher, Russell said. He said Stachura was suspended while school officials investigated his teaching methods.

"This is a rather volatile situation," said Russell.

Stachura, a resident of nearby Richmond, has been a teacher in the Memphis district for nearly 10 years. He was suspended by the school board following a meeting attended by about 40 parents.

Parents told board members that Stachura ridiculed students who refused to look at the photos taken of his wife in childbirth.

Other parents said their children told them Stachura pushed his views on breast-feeding.

Stachura refused to discuss the suspension, saying only he was "appalled and shocked" by the [remaining portions omitted from exhibit]

EXHIBIT 15

Board continues Stachura's suspension

MEMPHIS — The Memphis School Board voted on Monday, May 21, to continue the suspension of Middle School science and math teacher Edward Stachura — confirming the April 24 suspension by Supt. of Memphis Schools Don Russell.

The suspension came after a group of irate Memphis parents claimed that Stachura had overextended his teaching of the reproductive system and was in essence teaching sex education to his seventh graders without their permission.

The parents voiced their complaints at an April 23 school board meeting and the suspension came the following day.

A letter drafted to the board by a group of parents and presented by Memphis resident Dolores Truszkowski claimed that Stachura had shown a sex education film that had not been screened by local school officials and that he spent an inordinate amount of time in class discussing a chapter on reproduction. Parents made other, and enough, claims at the meeting to bring about a suspension. A formal adminsitrative reprimand procedure, dictated by procedures laid down in the teacher's contract will be held.

Stachura may come before the board this week, pending his approval of the tentative date, as part of a multi-stepped reprimand procedure that could take months to resolve. Stachura will be paid to at least Aug. 30 when his contract expires.

In other business the board:

Voted not to extend the request for an one-year extension of leave by teacher Ann Bovenshen.

- Voted to send board member Timothy Kelly as delegate to the June 4 Intermediate School District general fund meeting.

- Accepted the resignation of Athletic Director Ken Helinski. Helinski was director for the 1978-79 season and said that he wanted more time to spend with his family and school work.

- Extended the contracts for one year for teacher Rose and Becker.

- Set a $2,500 ceiling for the purchase of a new grass mower to be used for Memphis Schools.

- Approved the hiring of Ken Ricker as supervisor for CETA youths hired for maintenance work over the summer.

MEET MR. NEW YORK TIMES: WORLD'S MOST POWERFUL EDITOR
HOMEGROWN U.S. MARIJUANA REACHES GOURMET HEIGHTS

ESQUIRE

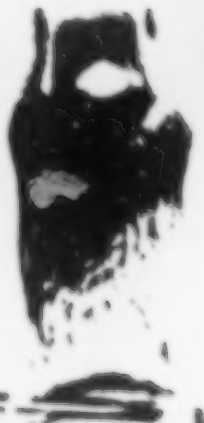
JANUARY 1980 $1.50

Dubious Achievement Awards of 1979!

Plus: Boo! The most dubious events of the past decade!

Ow!
Swedish scientists discover that earthworms feel pain!

Gulp!
Oregon DJ offers tonsils as first prize in contest!



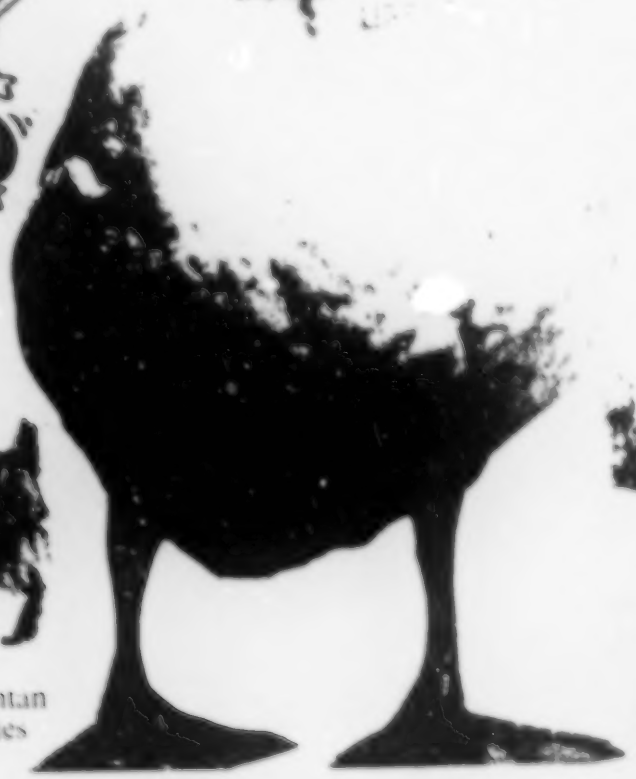
Shhh!
Canadian professor researches bean to solves the gas proble

Duh!
New dictionary grants "nerd" a place in the language!

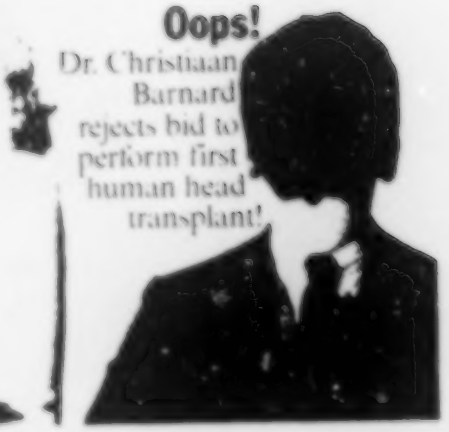
Amen!
Miss America thanks God for pulling her leg!

Honk!
Washington, D.C., golfer attacks goose with putter!

Boogie!
Medical journal reports disco music can cause finger pains!



Kaboom!
Air Force discovers marijuana joints at nuclear launch site!



Oops!
Dr. Christiaan Barnard rejects bid to perform first human head transplant!

Grrr!
Idaho woman bites suntan lotion, demands royalties on her bottom!*

EXHIBIT 16

ESQUIRE

DUBIOUS ACHIEVEMENT • AWARDS FOR 1979 •

As always, there's some good news and some bad news. Trouble is, as the decade dims and we dim with it, we can't tell which news is which. Or who's where, or what's when, or why he was laughing in the first place. But the year *is* over—no news here—and along with it the nine previous, each one worse than the next. They're over. Thank God

ESOPHAGUS NOW

After Dick Winslow appeared at Good Samaritan Hospital in Los Angeles complaining of pain in his throat, doctors found a Mickey Mouse watch lodged in his esophagus. Winslow said the watch must have been in a glass of vitamin pills he had swallowed several days earlier.

INTO THE OXYGEN TENT, MR. MAILER

A judge in Santa Ana, California, ruled that Herbert Blitz, in a coma for the past eight months, no longer had to make alimony payments to his ex-wife.

AND THEY SWORE THEY WOULDN'T REARM

A Tokyo company invented an "electronic head cooler," which, according to *Family Safety* magazine, is a device that straps around a driver's forehead and plugs into the cigarette lighter socket.

1. DRINKS AMARETTO AND CREAM
2. SPITS AMARETTO AND CREAM
3. THINKS PYRAMIDS GROW ON WOMEN

Hamilton Jordan circulated several hundred "staff evaluation forms" calling on senior government officials to evaluate one another's job performance, loyalty, and integrity. One question asked respondents to list three things about a colleague that disappointed them.

WHY IS THIS MAN LIMPING?

Because he joked about "Montezuma's revenge" while visiting Mexico?
Because he was attacked by a killer rabbit while fishing?
Because he changed the part in his hair from the right side to the left?
Because he wore funny yellow galoshes in Middletown, Pennsylvania?
Because he brought along his wife, who also wore them?
Because he ran twenty-two times around a riverboat deck?
Because he had hemorrhoids?
Because he clapped off beat and sang out of tune with a gospel group on the White House lawn?
Because he said naughty things about rhinoceroses?
Send completed forms to Patrick Caddell, c/o The White House, Washington, D.C. Neatness, not substance, counts.

4. SPENDS TOO MUCH TIME IN BEVERLY HILLS BATHROOMS

The new paperback edition of the Scribner-Bantam English Dictionary will include "nerd," defined as a "gauche, tacky, or uncool person; a creep."

5. SNIFFLES A LOT

The *National Enquirer* offered Dr. Christiaan Barnard $250,000 to perform a human head transplant.

AT LAST, A DISHWASHER-SAFE PIZZA

Kraft Inc., the food company, recalled 36,492 packages of mozzarella, fearing they might contain aluminum fragments.

AND WHILE YOU'RE WAITING, WOULD YOU MIND TURNING DOWN THAT RADIO?

During a wave of bank robberies in New York, Banco de Ponce, the city's largest Puerto Rican bank, posted a sign at tellers' windows that read, ATTENTION WOULD-BE BANK ROBBERS: THIS IS A SPANISH-SPEAKING BANK. IF YOU INTEND TO ROB US, PLEASE BE PATIENT, FOR WE MIGHT NEED AN INTERPRETER.

DO NOT GO BLOTTO INTO THAT GOOD NIGHT

Dr. Robert Kastenbaum, former head of Wayne State University's Center of Dying, Death, and Lethal Behavior, suggested that elderly people stop drinking wine because the "pleasurable feeling they derive from the use of wine may frighten them a little bit."

WATCHING ALL THE GIRLS, WATCHING ALL THE GIRLS, WATCHING ALL THE GIRLS GROW BY

Miss America 1980, Cheryl Prewitt of Ackerman, Mississippi, pledged to donate 10 percent of her earnings in the coming year to church charities, since God was "the instigator of this whole thing." Describing a prayer meeting that took place years after a car accident that had left one of her legs shorter than the other, Prewitt said, "I sat and watched my leg grow out instantaneously two inches."

WHY JOHNNY CAN'T GET IT UP

Michigan science teacher Edward Stachura was suspended for allegedly showing his seventh-grade class photos of his wife during childbirth.

DON'T BOTHER US NOW. WE'RE OFF TO CHRISTIE'S TO BID ON A QUEEN ANNE STOOL

Water officials in London, attempting to forecast future water demands, discovered a connection between a person's social class and the number of times he flushes the toilet. But the water authority refused to reveal publicly which group flushed the most and which group flushed the least.

GIVE OR TAKE A COUPLE OF INCHES

Dr. George Miller of Northern Illinois University used a mathematical formula based on past pageant records to predict that Cheryl Prewitt would become Miss America 1980. The study concluded that this year's winner would most likely be between nineteen and twenty-three; would be at least a college junior but not a graduate student; would have a plain name; would live in a small town but not in Delaware, Maryland, Nebraska, Nevada, New Mexico, North Dakota, or Vermont; would rank highly in the swimsuit competition; would weigh between 105 and 135 pounds; and would stand between five feet four inches and five feet ten inches tall.

PREREQUISITE: DOLLY PARTON, THE GEOLOGY OF A COUNTRY SONGSTRESS

The University of Tennessee at Knoxville offered a four-credit honor student course entitled "The Cultural Phenomenon of Elvis Presley: The Making of a Folk Hero."

NEXT MONTH'S CELEBRITY DONOR: RENEE RICHARDS

Oregon disc jockey Bob Anchetta held a contest that offered as its prize the tonsils of Iris Harrison, another local DJ. Entrants were asked to write a letter on why they wanted them. A poem by Jennie Jepson took first place, and Jepson received Harrison's tonsils in a nutmeat jar filled with formaldehyde.

NOW, THAT'S A FUNNY!

During a memorial service for Aldo Moro, retired Christian Democrat Angelo Gallo grabbed and twisted the ears of party member Amintore Fanfani because he "wasn't tough enough on communism."

LUCY IN THE SKY WITH GOOSE BUMPS

The Long Island Volunteers for Animal Welfare issued a summons to stop Lucy the mule from climbing a forty-four-foot wooden ramp and jumping thirty feet down into a tub of water. Although Lucy hurls herself off the platform without prodding, the animal welfare group insists that the mule undergoes heavy stress. Tim Rivers, director of High Diving Aqua Mules, insisted that there is "no way in this world you'd get a mule to go up there if she didn't want to."

SPEED IT UP. LUCY GOES ON IN TEN MINUTES

Graduate student Mark Gottlieb played the "aqualin" in a Stanford pool while his sister Karen accompanied him on the "hydrorgan."

WOODY THAT IT WERE TRUE

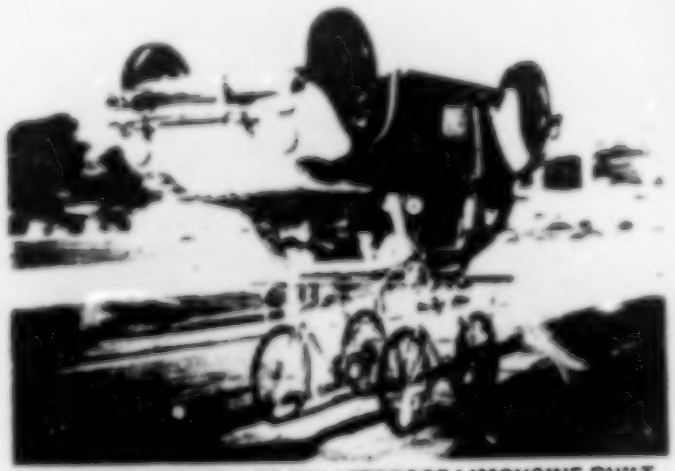
The editors of *Chemical and Engineering News* reported in error that a woodpecker's beak as it struck a tree had an impact velocity of 1,300 miles per hour. At that velocity, the woodpecker's head would break the sound barrier twice as it bounced against the tree.

WORST NEW MOVIE

Moment by Moment

RAINIEST DAY OF THE YEAR

July 26: Houston, Texas: twenty-five inches.



EXCLUSIVE PREVIEW OF BULLETPROOF LIMOUSINE BUILT FOR POPE JOHN PAUL II, A GIFT FROM RESIDENTS OF HIS HOMETOWN

WHO SAID NOTHING HAPPENED IN THE SEVENTIES?

An exclusive review of the decade's lowest moments

WHY IS THIS MAN LAUGHING?

1970 A few days after the Kent State shootings, President Nixon paid a 4:00 A.M. visit to antiwar protesters at the Lincoln Memorial and talked about football.

WHY IS THIS MAN?

WHY IS THIS?

1974 In Paris for Georges Pompidou's funeral, President Nixon declared, "This is a great day for France."

WHY IS?

1974 Four days after the Watergate transcripts were released, President Nixon gave a speech in Spokane, Washington, where he referred to Governor Daniel Evans as "Governor Evidence."

WHY?

1974 After he left office, President Nixon was voted the seventh-most-admired American by a poll of American people.

?

1976 Moments before beginning an interview with David Frost, President Nixon turned to Frost and asked, "Well, did you do any fornicating this weekend?"

BORN AGAIN IN THE 70s

Bob Dylan, Charles Colson, Larry Flynt, Eldridge Cleaver, Dean Jones, Tommy John.

THANKS FOR THE MEMORIES

NEW YORK TO SHIRLEY MACLAINE: SIT ON IT AND ROTATE"

1976 Onstage at the Palace Theater, Shirley MacLaine called New York "the Karen Ann Quinlan of American cities."

THE RUNNER BUMBLES

1978 Dennis Rainear was shot in the head at the ten-mile mark of a Michigan marathon. He finished the race, saying afterward, "I was sure I could knock thirty-one seconds off my time, and then this silly thing had to happen."

WHAT KIND OF MAN FEELS PLAYBOY?

1973 The town of Clarkstown, New York, named Harry Snyder, a blind man, to head its nine-man "obscenity committee" to screen cabaret acts, printed matter, and movies.

WE DON'T HEAR YOU APPLAUDING FOR:

1973 Henry Kissinger, who won the Nobel Peace Prize.

WHO'S ON FIRST?

1973 Yankee pitchers Fritz Peterson (left) and Mike Kekich (right) swapped wives.

WE DON'T BLAME HIM—THE STUFF COSTS MORE THAN LOX

1978 Asking "Why can't he die like a man?" David Shimp refused to donate the twenty-one ounces of bone marrow that might have saved the life of his cousin.

WORST MOVIE OF THE DECADE

Rabbit Test

MAY THE 80s BE SAFE FROM:

Tom Snyder, John Denver, Helen Reddy, Anita Bryant, Mark Lane, Sylvester Stallone, Guru Maharaj Ji, Chuck Barris, Werner Erhard, Fred Silverman, Spiro Agnew, Joe Garagiola, Marabel Morgan, Steven Weed, Bowie Kuhn, Jerry Brown, Rip Taylor, Sun Myung Moon, Steve Rubell, Billy Martin, Robby Benson, John Travolta, Chevy Chase, Robert Ringer, William Simon, Elizabeth Ray.

IS THAT A NIGHTSTICK IN YOUR POCKET, OR ARE YOU JUST GLAD TO SEE ME?

1971 Philadelphia police commissioner Frank Rizzo was elected mayor on a strong anticrime platform. "I'm gonna be so tough as a mayor," Rizzo promised. "I'm gonna make Attila the Hun look like a faggot."

ATTILA THE YOUNGER

1978 California GOP gubernatorial candidate Evelle Younger defended his failure to prosecute a single organized crime case while serving as state attorney general by saying, "I never said I was tough on crime."

WORST FLAVOR OF THE DECADE

Bon Vivant vichyssoise

EXHIBIT 19

(Photographs omitted in printing)

The teacher, the parents and sex

By CATHY TROST
Free Press Staff Writer

MEMPHIS, Mich. — This is a one-stoplight town that clings to an old highway and a stubborn kind of life, so nobody was much surprised when a cloud of trouble settled over the bean fields after a seventh-grade teacher was accused of telling his students strange things about sex.

Small towns have a reputation for turning whispers into indictments without putting a trial in between. That's what some people think happened to Edward Stachura, 35, a Memphis Middle School teacher who was suspended from his job five weeks ago. Other people say the teacher broke the rules of schooling and morality and should be fired.

"We feel violated. We feel wounded. I feel like this teacher imposed his morals on my children and infringed on my rights as a parent," says Marilyn Moore, a Memphis mother who was one of the first to complain about Stachura's teaching methods.

WHAT HAD BEEN quiet talk among mothers at band concerts and Little League fields hardened into accusations at a school board meeting April 23. Millage was on the agenda, but the man they called "the teacher" was on everybody's mind. A couple dozen parents forced the school board to stay late, and Dolores Truszkowski, who'd been appointed to do the talking, stood up and read a list of charges. The parents accused the teacher of:

- Spending six weeks on the chapter about human reproduction in the seventh-grade science textbook and just one week on the digestive system and two other subjects.

• Showing his students pictures of his wife having a baby and ridiculing children who didn't want to look at them.

• Putting sexual drawings on the chalkboard. "He drew a vagina and a penis and showed how they went together," Mrs. Truszkowski explained, "and he said you get 'errific sensations."

• Injecting his own morals about abortion, VD, nudity and breast-feeding into the science course.

• Undermining parents by telling students to bring their problems to him instead of taking them home.

The meeting turned mean. One man yelled that the teacher should be "tarred and feathered and thrown out of town." School board president and local egg farmer Herbert Kubisch said: "I wouldn't let my kid go to that class." A parents' committee was formed. Only one parent questioned the integrity of the meeting, saying ' 'I think that maybe the parents have fallen down."

STACHURA WAS ordered out of the classroom the next day. Some of the children in his classes revolted, and the substitute teacher had to be replaced. The students took up a petition to "get our teacher back" and put it on the principal's desk.

The whole controversy has turned the town of Memphis on edge. Sides have been formed, and the atmosphere was compared by one local newspaper columnist to the Salem witch trials.

And throughout all this, the school board has yet to file a formal charge against the suspended teacher.

Stachura would not agree to be interviewed or photographed. He said the Michigan Education Association (MEA), which represents teachers, advised him not to talk about the case until there is a solid charge that he can respond to.

"Believe me, I'm dying to lay out my story," he said in a telephone conversation from his Richmond home. "There is truth to another side, and that's my side.

DON GIESE, area MEA representative and Stachura's advisor, said: "This is the strangest thing I've encountered in my 21 years in the business.

"Certainly it would appear that Mr. Stachura is being denied the very basic rights protected by the Constitution. The right to face his accusers. The right to have a job," Giese said. "And the suspicion that has been created is being reinforced by the fact that he is not in the classroom.

"He's gone through all the training. He didn't do anything different this year than he did last year. All his lesson plans were approved by the building principal.

"This is really eating at him. He's really in a quandary as to where he went wrong."

Stachura has taught for the past nine years, the last two of them in Memphis.

THERE ARE OTHER people involved who won't talk. Charles (Bud) Becker, principal of the middle school would not discuss the case.

Memphis school superintendent Don Russell, a man viewed by some as one of the few voices of reason in the whole affair (and whose contract was not renewed at Monday's school board meeting), agreed to an interview and then did not show up for it.

School board president Hebert Kubisch, found pitching hay on his poultry farm, squinted into the sun and said: "There's nothing to talk about."

Finally, Robert Phillips, principal of the elementary school, agreed to answer a few questions. But he cautioned: "I have

to be very, very careful about what I say. I'm not going to put my neck out a mile and a half because I've got five more years to go.

"What appears to have happened," he said, "is that students took information about what they perceived was going on in their classes home to their parents."

See SEX, Page 4C

SEX, from Page 1C

Some of the parents met with school officials, and they in turn met with the teacher.

"ACCORDING TO SOME of the people who are making charges," Phillips said, "Mr. Stachura carried the information beyond that which was in the textbook."

Phillips said the science textbook in question — "Life Science," which is part of a McGraw Hill series called "Challenges to Science," recommended for grades seven through nine — was approved by the school board.

Phillips said he had not seen the alleged pictures of the teacher's wife having a baby.

"Mr. Stachura has admitted showing the pictures, but nobody knows which ones he showed," the principal said.

THE PICTURES are a matter of some dispute.

"I think he had three pictures'" said Mrs. Truszkowski, an open faced woman of 36 years, sitting in the converted schoolhouse she and her husband bought when they moved north from Roseville five years ago.

"One was a picture of his wife's face while she was having the baby. One of them was the baby actually coming out of the womb. I don't know the third."

"I never saw the pictures," said Marilyn Moore. "I heard the different classes saw different pictures. I think my daughter's class got the whole shot."

Suzanne Seifert and Lou Ann Grimson are two mothers who wrote a letter to the local newspaper in defense of the teacher.

They first talked to Mrs. Grimson's son, who is in the seventh grade science class.

"He said the pictures were of the teacher's wife when she was pregnant, but she had her clothes on," Mrs. Seifert said. "The other picture was of the baby after it was born."

SOME PEOPLE are troubled because the children are being dragged into the controversy as expert witnesses. Others are more concerned about what would have happened to the children "if he'd continued to teach that class."

Mrs. Moore's daughter, Margaret, is in Stachura's class.

"Margy was saying things," Mrs. Moore said, "I thought it was just stuff she picked up from watching TV or at pajama parties. Then she came home one day and told me he'd rearranged the seats to boy-girl, boy-girl, and I thought, what next?

"I began to develop fears about what his next move would be. Considering all the new philosophies, you know, the encounter groups and so forth, I was just worried about what was on his mind."

A former nurse, Mrs. Moore is quick to point out that she's not against sex education and that she is fully aware "that times change.

"It's the idea that they were force-fed this stuff under the guise of seventh grade science," she says. "If they could have just got the facts, without all the moralizing, it might have been okay.

DOLORES TRUSZKOWSKI is a conduit for every rumor in town because of her role as leader of the anti-Stachura group. She has no children in the middle school but says the parents asked her to speak for them because "I speak up if I don't like something. We have this right.

"One lady said her son came home from school, threw his books down and said, 'Well, now I know how to do it.'" Mrs. Truszkowski reported.

"He (Stachura) told the students nudity is fine, and if you can't walk around nude something is wrong with you. He told the girls to come to him if they got pregnant because he knows a place to get it fixed."

When questioned more closely, Mrs. Truszkowski admitted that most of the information was secondhand, culled by mothers who had children in Stachura's class. Neither she nor most of the protesting mothers had ever watched Stachura teaching or even met him.

"We heard that he taught in another town before Memphis and then he went to Japan," Mrs. Truszkowski said. "I feel that the time he spent in Japan is when he got his ideas. You just don't see everyday people taking pictures of their wives having babies."

Mrs. Truszkowski is only vaguely concerned about what other people think about how the case has been handled.

"A lot of people feel like we're the bad guys because we're not hep," she said. "But everybody is different. You know when your child is ready.

"My own personal view is that this man went too far. His beliefs are beyond this community."

MEMPHIS USED TO be a boom town of sorts when lumber was big, and M-19 was the main north-south route through the Thumb. Now it's a town of about 1,200 residents,

a worn-out Main Street, walnut trees, lilac bushes and big frame houses.

The town sits 45 miles northeast of Detroit.

There's a code of behavior in Memphis, as in most small towns. A mind-your-own-business, conservative ethic that has been shattered by the uproar over "the teacher."

"This has polarized some elements in the community," says Phillips, 50, the elementary school principal who was born in Memphis and who raised seven children there.

"Some citizens are very much behind Mr. Stachura and say he is an excellent teacher. Other citizens think he stepped out of line and needs to be spanked. In my opinion, it has been blown out of proportion."

Allowing that the Memphis old-timers " are the more conservative elements and would probably be the ones that would want to crucify Mr. Stachura," the principal stessed that "the rules are set and you follow 'em. If he stepped beyond those rules, he was wrong."

DOWN ON MAIN Street, just a mile or so from the school, is the Sip n' Chat Tavern, where Suzanne Seifert, 31, bartends afternoons. There's an American Legion poster on the wall with a flag and a GI helmet. The poster says: "Let's not overlook those who have looked over us."

"I think it's really rotten what they did to him," Mrs. Seifert says explaining why she and a few other couples in town braved the tide and came out publicly in support of the teacher. "If my son couldn't ask me a question about sex, I'd rather see him asking his teacher than finding out in the streets. Mr. Stachura acted like he generally cared about kids. If he thought my son was doing poor, he'd send home a note.

"The guy is getting a raw deal."

Stachura has been formally suspended with pay through September. If the school board brings formal tenure charges, there will be a hearing. The verdict from that hearing can be appealed to the Michigan Tenure Commission. Cases like this can drag on for years.

"Sometimes I feel sorry that it all came out the way it did," Mrs. Truszkowski says. "Maybe he was trying to open up the community."

She stops and struggles for words. "But giving his own opinions, that's what really hurts."

Mrs. Moore concedes that the teacher is "very dynamic and probably well intended. Maybe a little zealous. He tried to be like a father. "I don't want to ruin anybody," she says.

Order Granting Certiorari

[Caption Omitted in Printing]

The Petition for a Writ of Certiorari is granted limited to Questions I and III presented by the Petition.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-410

In the Supreme Court of the United States

October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, et al,
Petitioners,

v.

EDWARD J. STACHURA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

December 12, 1985

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QUESTIONS PRESENTED

I.

WHETHER IN AN ACTION UNDER 42 U.S.C. § 1983 (1982) THE COURT ERRED BY UPHOLDING A JURY INSTRUCTION AUTHORIZING DAMAGES BASED UPON THE INTRINSIC "VALUE" OF BOTH THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS INVOLVED.

II.

WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE DISTRICT COURT.

---

* The following individuals and/or entities were parties to the proceedings in the Sixth Circuit Court of Appeals: Ms. Delores Truszkowski (who is not a party to the Supreme Court proceedings), Petitioners Memphis Community School District, the Board of Education of the Memphis Community Schools, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Bernice Dolan, Donald C. Russell, and Respondent Edward J. Stachura.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, ET AL.,
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v.

EDWARD J. STACHURA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Memorandum Opinion of the United States District Court, Eastern District of Michigan, is unreported and appears in the Appendix to the Petition for Writ of Certiorari, B-1. The Opinion of the Sixth Circuit Court of Appeals is reported at 763 F.2d 211 (1985) and appears in the Appendix to the Petition for Writ of Certiorari, C-1.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 3, 1985. Petitioners' Petition for Writ of Certiorari was filed on August 30, 1985, within ninety days of the Court of Appeals' Judgment. On October 21, 1985, this Court granted Certiorari limited to questions I and III presented by the Petition. This Court's jurisdiciton is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I (in pertinent part):

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const., amend. XIV, Section 1 (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (1982) (in pertinent part):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Respondent, a tenured teacher in the Memphis Community School system, was responsible for teaching life science to seventh grade students (ages 11 through 15) during the 1978–79 school year. (R.134, 136, 140). On April 24, 1979, numerous parents[1] appeared at a special Board of Education meeting (a meeting called to discuss a local school millage) to complain about the manner in which Respondent conducted his life science class. (R. 655-62, 774, 999, 1211, 1214). After the special Board meeting was adjourned, Defendant Delores Truszkowski, who was not a Board member, read a statement to the Board of Education concerning Respondent's teaching methods. Amid parental threats to picket the school building and force their children to boycott the Respondent's class, Superintendent Donald Russell suspended Respondent Stachura with full pay pending an investigation. (R. 199, 200, 387, 402, 403, 583-84, 1214, 1216, 1217).

The controversy surrounding Respondent Stachura was widely reported in the press. Articles concerning Respondent appeared in the *Detroit Free Press,* the *Pacific Stars and Stripes* (a military service newspaper), the *Richmond Review* (Richmond, Michigan), and other newspapers. (J.A. 101-10, 115-21). Additionally, Respondent Stachura's name appeared in the January 1980 edition of *Esquire* magazine as a recipient of one of its 1979 "Dubious Achievement Awards". (J.A. 122).[2]

---

[1] Although it is uncertain how many parents attended the meeting, Petitioner Kubisch estimated the number to be as great as sixty or seventy. (R. 744).

[2] Respondent's "newspaper article" exhibits were admitted into evidence for the limited purpose of demonstrating that the controversy involving Stachura attracted publicity. The articles were not admitted to prove the truth or falsity of the matters asserted therein. (J.A. 35, 52).

Subsequent to his suspension with pay, Respondent filed a grievance contesting that suspension and requesting reinstatement to the classroom. (R. 289, 372, 374, 376, 377, 378, 429, 530).[3] Respondent considered his grievance a "request for hearing" in regard to his suspension. (R. 392). Notwithstanding the fact that Respondent's Collective Bargaining Agreement called for binding arbitration, Respondent abandoned his grievance after a July 1979 Board of Education hearing which he refused to attend personally. (R. 290, 377, 378).

Immediately after Respondent abandoned his grievance, the instant lawsuit was commenced in the United States District Court for the Eastern District of Michigan. (J.A. 1-16). The Complaint filed by Respondent and one of Respondent's students (Plaintiff MacDonald) sought relief from the Board of Education, the individual Board members, the superintendent of schools, the former superintendent of schools, the building principal, and two private individuals (Defendants Moore and Truszkowski[4] (J.A. 1-16).[4]

During a lengthy trial, Petitioners argued that Respondent had not been deprived of his constitutional rights and, even if constitutional violations were found, Petitioners' actions did not cause Respondent's alleged injuries. In closing argument, Petitioners' counsel stressed that the evidence showed Petitioners' actions did not cause the widespread publicity surrounding Respondent. (R. 1786, 1810, 1821, 1822).

After closing arguments, the District Court gave lengthy instructions to the jury. (R. 1836-98). On the issue of damages,

[3] Respondent never filed a grievance regarding a subsequent letter of reprimand. (R. 511).

[4] Defendant Truszkowski was substituted for the "Mary Roe" Defendant originally named when Respondent filed his Amended Complaint. (J.A. iii).

the District Court first instructed that if the jury found Petitioners were liable to Respondent, the jury could award "compensatory" damages in an amount "as will reasonably compensate him for such injury and damage". (J.A. 93). The District Court then instructed the jury that it could award punitive and exemplary damages "in order to punish any wrongdoer for some extraordinary misconduct". (J.A. 94). Additionally, the District Court instructed the jury:

> If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.
>
> The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

(J.A. 96). Petitioners timely objected to this latter instruction on the basis of this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978). (J.A. 98). The District Court, relying upon decisions by the Tenth and Eighth Circuit Courts of Appeals, overruled Petitioners' objection. (J.A. 98).

The jury returned a verdict in favor of Respondent and awarded $275,000.00 in compensatory damages and $46,000.00 in punitive damages.[5] The jury found that Petitioners had deprived Respondent of his property interest in his employment and his liberty interest without due process of law. Additionally, the jury found that Petitioners had deprived Respondent of his First Amendment rights. (J.A. 98-100).

Petitioners and Defendant Truszkowski separately moved for a New Trial or, in the alternative, Judgment Notwithstanding the Verdict. Petitoners' motion asserted, among other errors, that the District Court's instruction regarding damages conflicted with this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978). Appendix to Petition for Writ of Certiorari, B-8. The District Court again relied upon the decisions of the Tenth and Eighth Circuit Courts of Appeals and denied Petitioners' Motion. Appendix to Petition for Writ of Certiorari, B-8

Defendant Truszkowski moved for a New Trial/Judgment Notwithstanding the Verdict on the grounds that her alleged wrongful conduct, filing complaints about a school teacher with the local Board of Education, was protected by her First Amendment right to petition the government for a redress of grievances. The District Court concluded that Ms. Truszkowski's conduct was constitutionally protected and granted her Motion for JNOV. Appendix to Petition for Writ of Certiorari, B-9.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. Respondent cross-appealed the District

[5] The jury found in favor of Respondent as to Petitioners Kubisch, Walters, Gunn, Kelley, Delekta, Beaudrie, Dolan, Russell and the Board of Education; in favor of Respondent as to Defendant Truszkowski; against Respondent as to Defendants Moore, Phillips and Becker; and against Plaintiff MacDonald as to all Defendants. (J.A. 98-100).

Court's decision granting Ms. Truszkowski's Motion for Judgment Notwithstanding the Verdict. On June 3, 1985, the Sixth Circuit Court of Appeals affirmed the jury verdict and District Court's decision in all respects. Appendix to Petition for Writ of Certiorari, C-1.

Although the Court of Appeals indicated that its "most substantial concern" centered on the "substantial damages awarded by this jury", the Court of Appeals nevertheless concluded that:

> Contrary to the situation in *Carey v. Piphus*, 435 U.S. 247 (1978), relied on by appellant School District, there was proof from which the jury could have found, as it did, actual and important damages.

Appendix to Petition for Writ of Certiorari, C-7.

Petitioners timely filed a Petition for Writ of Certiorari with this Court on August 30, 1985. The Court granted Certiorari on October 21, 1985 "limited to issues I and III presented by the Petition". (J.A. 130).

SUMMARY OF ARGUMENT

I.

The instruction given by the District Court improperly authorized the jury to award Respondent substantial nonpunitive damages for the deprivation of his substantive constitutional rights without proof of actual injury. Furthermore, the instruction allowed the jury to award damages based upon the intangible "value" of constitutional rights.

Both the language of 42 U.S.C. § 1983 (1982) and its legislative history demonstrate that § 1983 authorizes substantial nonpunitive damages *only* to compensate for actual injury. This Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978),

and its subsequent decisions, recognize that the "cardinal principle" of damages in § 1983 litigation is *compensation* for actual injury.

Additionally, policy considerations mandate the conclusion that damage awards based upon the inherent "value" of constitutional rights are improper. Once a plaintiff has been fully compensated for actual injuries caused by constitutional deprivations, further "windfall" damage awards chill public officials in the performance of their duties and strain public treasuries. Such intangible inherent "value" damages could easily be awarded in lieu of punitive damages, not recoverable against municipal corporations.

II.

The instruction given by the District Court was directly contrary to this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978). The case at bar involves procedural due process claims, as well as substantive due process claims. The jury was authorized to return damages "for the deprivation" of Respondent's procedural due process rights, based on the inherent "value" of those rights. As in *Carey*, causation issues were crucial issues in this case. For this reason alone, the decision must be reversed.

III.

Because the "general damages" award was based upon an erroneous jury instruction, the Court of Appeals erred by affirming the District Court. Since the issue of damages in this case is so interwoven with that of liability, the entire case should be remanded to the District Court for a new trial. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

ARGUMENT

I.

THE DISTRICT COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD AWARD RESPONDENT DAMAGES "FOR THE [CONSTITUTIONAL] DEPRIVATION" BASED UPON THE "VALUE" OF THE SUBSTANTIVE CONSTITUTIONAL RIGHTS INVOLVED

Respondent Stachura's Complaint alleged that Petitioners' actions deprived him of his First Amendment Rights to Freedom of Expression. *See* Complaint (J.A. 8-11). At the conclusion of trial, where causation issues were vigorously contested (R. 1786, 1810, 1821, 1822), the District Court instructed the jury:

> If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages *to compensate him for the deprivation*. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, *no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation*. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.
>
> The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the *importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the*

right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

(J.A. 96) (emphasis added).

Petitioners respectfully contend that the District Court erred in instructing the jury that it could award Respondent Stachura "damages" "for the deprivation" of his First Amendment Rights to Freedom of Expression, especially when those damages were based upon the "importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of [Respondent's] activities. . . ." Neither the language of 42 U.S.C. § 1983 (1982) nor its legislative history support an award of damages for deprivations *per se* based upon the intangible "value" of the constitutional right involved. This Court has recognized that noncompensatory, nonpunitive damages are not available under § 1983. Finally, both logic and public policy support Petitioners' contention that the jury instruction given by the District Court was erroneous.

A. NEITHER THE LANGUAGE OF 42 U.S.C. § 1983 (1982) NOR ITS LEGISLATIVE HISTORY SUPPORT THE VIEW THAT RESPONDENT CAN RECOVER SUBSTANTIAL NONCOMPENSATORY, NONPUNITIVE DAMAGES AS A RESULT OF AN ALLEGED CONSTITUTIONAL DEPRIVATION.

This Court has frequently emphasized that when resolving issues of statutory interpretation "the 'starting point' must be the language of the statute itself." *Lewis v. United States*, 445 U.S. 55, 60 (1980). *See also Smith v. Wade*, 461 U.S. 30, 85

(1983) (Rehnquist, J., dissenting). Section 1983 reads (in pertinent part):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the *party injured* in an action at law, suit in equity, or other proper proceeding for redress. . . .

(emphasis added). The statute, by its very terms, only creates civil liability in favor of a "party injured" by a constitutional deprivation.

Although § 1983's language appears clear on its face, the civil liability created by the statute "cannot be understood in a historical vacuum." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).[6] Both the legislative history of the statute and its historical context demonstrate that § 1983 created a federal damages remedy for persons injured by constitutional deprivations, not a civil penalty for constitutional deprivations absent actual injury.

This Court has often analyzed the history of the 1871 Civil Rights Act, the predecessor to what is now § 1983. *Monroe v. Pape*, 365 U.S. 167 (1960); *Mitchum v. Foster*, 407 U.S. 225 (1972); *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978); *City of Newport*, 453 U.S. 247; *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Smith*, 461 U.S. 30. The 1871 Civil Rights Act became law on April 20, 1871, less than one

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[6] As Justice Oliver Wendell Holmes wrote, "[u]pon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

month after President Ulysses S. Grant sent a "dramatic message" to Congress describing the breakdown of law and order in the Southern states as a result of Ku Klux Klan violence. *Briscoe,* 460 U.S. at 337. Section 1 of the 1871 Civil Rights Act, now codified as § 1983, encountered little Congressional debate. The language originally introduced remained unaltered throughout the legislative process, including submission of the Act to multiple House-Senate Conference Committees. *Monell,* 436 U.S. at 666-68.

Section 1 of the 1871 Act was "modeled" after § 2 of the 1866 Civil Rights Act. *Mitchum,* 407 U.S. at 238; *Monroe,* 365 U.S. at 185 (quoting Rep. Shellabarger). It has been suggested that Congressional debate over the provisions of § 1 of the 1871 Civil Rights Act was limited because that Bill so closely paralleled § 2 of the already enacted 1866 Civil Rights Act. *Briscoe,* 460 U.S. at 361 (Marshall, J., dissenting).

During consideration of the 1866 Civil Rights Act, Representative John A. Bingham attempted to amend that Bill to create a civil remedy for constitutional deprivations. *Briscoe,* 460 U.S. at 360 (Marshall, J., dissenting). In 1866, Bingham's amendment was defeated. In the 42nd Congress, Representative Bingham served as Chairman of the House Judiciary Committee. *id.* Not coincidentally, Representative Bingham had also drafted Section 1 of the Fourteenth Amendment and indicated during Congressional debates in 1871 that he drafted Section 1 of the Fourteenth Amendment in light of *Barron v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243 (1333). *Monell,* 436 U.S. at 686-87. *Barron* stands for the proposition that the Just Compensation Clause of the Fifth Amendment is not directly applicable to the states. Thus, according to Bingham, " 'the City had taken private property for public use, *without compensation* . . . and there was no redress for the wrong.' " *Monell,* 436 U.S. at 687 (emphasis added).

Representative Bingham's role in both the adoption of the 1871 Civil Rights Act and the drafting of the Fourteenth

Amendment adds considerable support to the view that the 1871 Act was intended by Congress to create a federal damages remedy to compensate for actual injury. Through the Fourteenth Amendment, the drafters imposed a just compensation requirement upon the states. Through the 1871 Civil Rights Act, adopted expressly to enforce the provisions of the Fourteenth Amendment, Congress created a means for individuals to enforce that just compensation requirement.

The Fourteenth Amendment admittedly imposes more than merely a just compensation requirement upon the states. However, when legislation is enacted with a specific case in mind, that legislation draws a significant color or context from that specific case. Additionally, it would not be inappropriate to presume that Representative Bingham's views would have at least been known to Congress since he was Chairman of a powerful House Committee.

Other legislative history supports the contention that § 1 of the 1871 Act created a compensatory damages remedy for persons injured as a result of constitutional deprivations. When the Bill which would become the 1871 Civil Rights Act was considered by the Senate, Senator Sherman proposed an amendment which would have made the inhabitants of a county, city or parish "liable 'to pay full compensation' to the person damaged[,] his widow[,] or legal representative." *Monroe,* 365 U.S. at 188. Senator Sherman's proposed amendment would have made local individuals liable for the damage caused by Ku Klux Klan violence. *Monell,* 436 U.S. at 657. The purpose of Sherman's amendment was to provide a means to *compensate for injury. Monell,* 436 U.S. at 694. Indeed, during legislative debates over the Sherman Amendment, supporters specifically referred to a Pennsylvania statute "strikingly similar to the Sherman Amendment" which had been interpreted to entitle a plaintiff to recover "compensatory damages" as part of a municipal corporation's obligation to make reparations for "*injuries* sustained as a

result of lawless violence." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262 and n. 22 (1981) (emphasis added).

While Senator Sherman's amendment was rejected, a revised version of that amendment became § 2 of the Act. This provision, the predecessor to 42 U.S.C. § 1985 (1982), permitted an injured party to recover "*damages occasioned by such injury or deprivation of rights* . . ." 17 Stat. 14. Furthermore, the predecessor to what is now 42 U.S.C. § 1986 (1982) provided a remedy "for all *damages caused by any such wrongful act*. . . ." 17 Stat. 15. *See also Carey v. Piphus*, 435 U.S. 247, 256 n. 10 (1978).

It is difficult to believe that when enacting the 1871 Civil Rights Act Congress impliedly created a damages remedy for the deprivation of constitutional rights *per se* in § 1, while expressly limiting damages in other parts of the Act to compensation for injuries *caused* by constitutional deprivations. *See also* Remarks of Representative Wilson, Cong. Globe, 42nd Cong., 1st. Sess., 482 (1871) ("[W]hat legislation could be more appropriate than to give a person injured by another under color of. . .State laws a remedy by civil action."); Remarks by Representative Burchard, Cong. Globe App., at 313 ("To the first section, giving an injured party redress by suit at law in United States courts in the cases enumerated, I can see no objection.").

This legislative history indicates that by enacting the 1871 Civil Rights Act Congress contemplated the creation of a compensatory damages remedy, not a means to impose substantial nonpunitive, noncompensatory damages for constitutional deprivations *per se*. The District Court's instructions to the jury in the case at bar authorized the jury to award damages for constitutional deprivations *per se*, calculated upon the intangible "value" of the constitutional right in question. That instruction cannot be supported by either the language of § 1983 itself or its legislative history.

Indeed, had the 42nd Congress intended to create a *per se* damages remedy for constitutional deprivations, without regard to the extent of injuries caused by those constitutional deprivations, it knew how to do so. The Act of May 3, 1870, § 2, 16 Stat. 140, created a private cause of action for persons suffering from racial discrimination in voting registration and imposed a *per se* $500.00 civil remedy for any person aggrieved. It is difficult to believe that a Congress able to expressly create a *per se* civil damages remedy for a deprivation of the right to vote would create a *per se* deprivation remedy by obscure implication in the 1871 Civil Rights Act.

Aside from the 1871 Act's legislative history, the historical context of its adoption further supports Petitioners' contention that § 1 of the Act did not create a substantial nonpunitive damages remedy for constitutional deprivations *per se*. As this Court has frequently stated, a fundamental assumption underlying the interpretation of § 1983 is that the members of the 42nd Congress were familiar with the common law principles of their day. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983). "[T]he principle that damages are designed to compensate persons for injuries *caused by* the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871." *Carey*, 435 U.S. at 255 (emphasis added, footnote omitted).

Section 1983 was intended to create a "species of tort liability." *Carey*, 435 U.S. at 247; *Smith v. Wade*, 461 U.S. 30, 34 (1983). Professor Prosser has defined the purpose of the law of torts as "to compensate [the injured person] for the *damage he has suffered*, at the expense of the wrongdoer." W. Prosser, Law of Torts, § 2, at 7 (4th ed., 1971) (emphasis added). Indeed, the "most common meaning of the term 'damages' is *compensation for actual injury*." 25 C.J.S. *Damages*, § 1(a) (1966) (emphasis added). The primary object and fundamental principle of damages is "just compensation" for a loss or injury

sustained. 25 C.J.S. *Damages*, § 3 (1966). In the absence of actual injury, nominal damages are awarded to vindicate a technical deprivation of a right. D. Dobbs, Law of Remedies, § 3.1 (1973); also cited in *Carey*, 435 U.S. at 255, n. 7.

These compensation principles, known to the members of the 42nd Congress, were self-evident given the scope of the problem Congress was called upon to redress. Congress simply was not concerned in 1871 with subtle constitutional deprivations which did not result in actual injury. Congress was concerned with the "reign of terror" inflicted by the outrages of the Ku Klux Klan; arsons, robberies, whippings, shootings, and murders committed, in some cases, under color of state law and, in other cases, unredressable under state law because Klan members and their sympathizers controlled local governments. *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983); *Monroe v. Pape*, 365 U.S. 167, 174-75 (1960). The compensation principle was the cornerstone upon which Congress based the 1871 Civil Rights Act.

In the case at bar, the District Court's jury instructions authorized an award of damages "for the deprivation" of a constitutional right *per se*. Additionally, the jury was allowed to award substantial damages based upon the intangible "value" of Respondent's constitutional rights. Independently, either portion of the instruction was erroneous. Taken together, the District Court's error was compounded beyond recognition. This jury instruction is unsupported by the language of § 1983 itself, its legislative history, or the historical context of the 1871 Civil Rights Act.

B. THIS COURT HAS RECOGNIZED THAT IN § 1983 LITIGATION, NONPUNITIVE DAMAGES MAY BE AWARDED ONLY TO COMPENSATE FOR INJURIES CAUSED BY CONSTITUTIONAL DEPRIVATIONS.

The leading case interpreting damage awards under 42 U.S.C. § 1983 (1982) is this Court's decision and analysis in *Carey v. Piphus*, 435 U.S. 247 (1978). While the facts involved in *Carey* concerned damage awards for deprivations of procedural due process, the principles and concerns articulated by this Court equally apply to damage awards for deprivations of substantive constitutional rights. The Court's principled analysis in *Carey*, and its subsequent decisions relating to *Carey*, bely Respondent's assertion that "*Carey* has no relevance to the deprivation of substantive constitutional rights." Response to Petition for Writ of Certiorari, at 4.

In *Carey*, Respondents Piphus and Brisco had been suspended from school for more than 20 days as a result of unrelated incidents of misconduct. The District Court concluded that both students had been suspended without due process. However, the District Court declined to award damages because Respondents failed to introduce evidence of actual injury. *Carey*, 435 U.S. at 251-52. The Seventh Circuit Court of Appeals reversed the District Court and held that Respondents could recover "substantial nonpunitive" damages simply because they had been denied procedural due process. *Id.* This Court "granted certiorari to consider whether, in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages." *Id.*, at 253.

In holding that a plaintiff must prove actual injury prior to an award of substantial nonpunitive damages under § 1983, the Court emphasized that § 1983 was "intended to '[create] a

species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Id.* (brackets in original, citations omitted). The Court stressed that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Id.*, at 254. The Court then re-emphasized that the "'cardinal principal of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.'" *Id.*, at 254-55 (citations omitted, emphasis in original).

While *Carey* was a "procedural due process" case, these principles equally apply to damage awards based upon deprivations of substantive constitutional rights. There is no reason to distinguish between injuries caused by procedural rather than substantive due process deprivations. Indeed, the distinctions between substantive constitutional rights and procedural constitutional rights are often difficult to ascertain.

In drafting § 1983 as enacted, the 42nd Congress failed to distinguish between damage awards based upon the types of constitutional rights at issue. *Carey* was primarily a case involving *statutory interpretation* and that statute, on its face, does not distinguish between categories of constitutional rights. There is no reason for a court to ignore the "cardinal principle of damages" in the context of substantive constitutional rights.

This Court's decision in *Carey* appeared to recognize this self-evident reality. After concluding that § 1983 damage awards must be based upon actual injuries, the Court explained its holding by noting that: "[t]he lower federal courts appear generally to agree that damages awards under § 1983 should be determined by the compensation principle." *Id.*, at

255 (footnote omitted). The Court cited five lower court decisions as support for that principle. Of those five court decisions, four concerned damage awards for injuries caused by deprivations of substantive constitutional rights. *Magnett v. Pelletier*, 488 F.2d 33 (1st Cir. 1973) (nominal damages should be awarded for unlawful search and seizure absent proof of actual injury); *United States ex rel Tyrrell v. Speaker*, 535 F.2d 823 (3rd Cir. 1976) (concerning substantive due process right against arbitrary administrative prison segregation); *Stolberg v. Board of Trustees for the State Colleges of Connecticut*, 474 F.2d 485 (2nd Cir. 1973) (concerning alleged deprivations of First Amendment rights); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) (same). The fifth case relied upon by the Court also seemed to primarily involve substantive constitutional rights, although the lower court did not address that issue. *United States ex. rel Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975) (damages awarded based upon Plaintiff having been placed in solitary confinement for twelve days for possession of "revolutionary papers" and having been incarcerated in solitary confinement five days longer than prison regulation allowed).

Since the *Carey* decision, subsequent decisions by this Court have indicated that the principles articulated in *Carey* apply to both procedural and substantive due process cases. On at least two occasions the Court has noted that "after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but *the victim cannot prove compensable injury*." *Carlson v. Green*, 446 U.S. 14, 22 n. 9 (1980) (emphasis added); *Smith v. Wade*, 461 U.S. 30, 53 n. 21 (1983). In *Smith*, 461 U.S. at 52, distinguishing between punitive and compensatory damages, the Court stated: "Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages *in an amount appropriate to compensate the plaintiff for his loss*." (emphasis added).

In the case at bar, the Judge's instruction to the jury is the antithesis of the principles articulated in *Carey* and this Court's subsequent decisions. By authorizing the jury to award damages based upon "the role which the right has played in the history of our republic," the Judge authorized the jury to award substantial damages without regard to whether any actual injury was caused by the constitutional deprivation. Furthermore, damages based upon consideration of "the importance of the right in our system of government" do not promote the goal of compensating Respondent for any actual injury he may have suffered. This jury instruction completely contradicts the principles recognized in *Carey*.

C. THE POLICIES UNDERLYING § 1983 SUPPORT THE VIEW THAT SUBSTANTIAL NONPUNITIVE DAMAGES MAY ONLY BE AWARDED TO COMPENSATE RESPONDENT FOR INJURIES CAUSED BY CONSTITUTIONAL DEPRIVATIONS.

When called upon to construe § 1983, this Court has conducted a "careful inquiry" into considerations of both § 1983's history and its underlying policy. *City of Newport v. Fact Concerts, Inc.*, 435 U.S. 247, 259 (1983). Assuming, arguendo, neither the great common law tradition of Anglo-American jurisprudence nor § 1983's language and legislative history mandate the conclusion that the jury instruction given in this case was erroneous, the policies underlying § 1983 require the conclusion that the District Court erred by authorizing the jury to award damages "for the deprivation" of Respondent's rights in such an amount as to compensate him for the intangible "value" of the constitutional rights.

The policies underlying § 1983 include both compensation for persons injured by deprivations of federal rights and prevention of abuses by those acting under color of state law.

Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978). Both compensation and deterrence are acknowledged goals underlying damage awards in § 1983 litigation. However, it has never been suggested that punishment was the dominant purpose or even a prominent purpose behind § 1983. *City of Newport*, 453 U.S. at 268.

Once a person injured as a result of constitutional deprivations has been fully compensated, the public interest is not served by "windfall" damage awards. Damage awards not limited to compensation for actual injuries caused by constitutional deprivations bear no relation to the compensatory purposes behind § 1983.

Both supporters and opponents of the 1871 Civil Rights Act expressed concern over the possible financial burden imposed on local governments and governmental officials by excessive jury verdicts. *City of Newport*, 453 U.S. at 265. This Court has recognized the very real dangers posed by such noncompensatory damage awards. In holding that punitive damages were not recoverable against a municipal corporation, the Court stressed that punitive damage awards in such circumstances would be likely to be accompanied by an increase in taxes or a reduction in public services. *City of Newport*, 453 U.S. at 267.

A recent decision by the Tenth Circuit Court of Appeals demonstrates the policy behind the need to limit damages awards in § 1983 litigation to compensation for actual injury. In *Bell v. Little Axe Independent School District No. 70*, 766 F.2d 1391, 1408 (10th Cir. 1985), the court held that "plaintiffs are entitled to recover compensatory damages for the loss of the inherent value of their rights under the Establishment Clause, even if they are unable to demonstrate consequential injury." However, earlier in its opinion, the court ruled that plaintiffs had standing to contest the alleged Establishment Clause violations because they were parents of students attending the school where the violations occurred. *Bell*, 766 F.2d at 1398.

By implication, the Tenth Circuit has ruled that every parent of every student at the Little Axe Independent School District can maintain an action for substantial nonpunitive, noncompensatory damages. In such a case, the school district faces unimaginable and unparalleled civil liability which must inevitably be borne by local taxpayers.

In the case at bar, $275,000.00 in "compensatory damages" were awarded against a local school district and local school officials. The jury had been instructed that punitive damages could not be awarded against the school district. (J.A. 94). Immediately thereafter, the jury was instructed that it could award damages against the school district "for the deprivation" based upon the intangible "value" of the deprived constitutional rights. (J.A. 96). While it is impossible to ascertain the motivation of the jury in this case, the jury could easily have concluded it was required to award substantial damages for the "value" of the deprived constitutional right in lieu of a punitive damage award. This could explain why the jury returned a verdict against the governmental entity in the amount of $233,750.00. (J.A. 100).

The "windfall" damage potential of this jury instruction becomes clear when it is remembered that the jury instruction authorized an award of damages without regard to Petitioners' conduct or the impact of Petitioners' conduct upon Respondent.

Possible jury awards based upon the "value" of the constitutional right involved pose very real threats to public officials and governmental entities. This fear of exposure can deter public officials from taking any action at all. The public policy behind the qualified immunity defense also supports Petitioners' contention that substantial nonpunitive damages cannot be recovered in the *absence* of actual injury. The obvious chilling effect such damage awards would have upon

public officials, similar to the school board members in the case at bar, is clear and real.

Not only would substantial nonpunitive, noncompensatory damages awards threaten to impose a financial strain upon public treasuries and chill public officials, but such awards under § 1983 would draw an arbitrary distinction between state and federal officials. In direct actions against federal officials for constitutional deprivations, the plaintiff is entitled to recover compensatory damages based upon actual injury and, in some cases, punitive damages based upon the conduct of the wrongdoer. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[1] Thus, in a direct action under the Fourth Amendment against federal officials for a deprivation of Fourth Amendment rights, a plaintiff would be entitled to recover damages only to compensate for the injury sustained as a result of the constitutional deprivation. However, if the same plaintiff suffered the same injuries caused by state officials, the plaintiff could recover substantial noncompensatory, nonpunitive damages because of the defendant's "status" as a state official.

Damage awards, whether imposed against individuals or governmental entities should be based upon actual injury caused by the constitutional deprivations or punitive damages based upon the motivation of the individual. To authorize a jury to award damages for a "priceless" constitutional right makes no sense in the context of § 1983 litigation. If judges were authorized to instruct a jury to return damage awards based upon the "importance of the right in our system of government", counsel could be expected to introduce "expert testimony" as to the importance of that right by way of history

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[1] The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation . . . is entitled to redress his injury . . . ." *Bivens*, 403 U.S. at 397 (emphasis added).

tests and constitutional scholars. It would not be unreasonable to see defense counsel focusing on the "value" of the constitutional right in 1871, the year § 1983 was originally adopted, as the focal point for the jury's deliberations. Plaintiff's counsel could be expected to emphasize more recent civil rights struggles to focus the jury's attention upon the sacrifices made to protect current constitutional liberties. Unfortunately, neither tactic would further the primary goal of § 1983, compensating for the plaintiff's actual injuries.

The jury instruction given in the case at bar "opened the door". It authorized the jury to return whatever verdict it deemed necessary to "right the wrong". Once the jury was instructed to return damages "for the deprivation" based upon the right's "value", no reviewing court could fairly evaluate the jury's verdict.

In its decision below, the Sixth Circuit Court of Appeals' "most substantial concern" related to "the substantial size of the jury verdict in this case". Notwithstanding this concern, the court concluded that "there was ample proof of actual injury to plaintiff. . . ." While that is one possible interpretation of the jury verdict, there are others equally consistent with the award. In *Carey v. Piphus*, 435 U.S. 247 (1978), this Court recognized that causation issues are central and significant issues in the context of § 1983 litigation. *Carey*, 435 U.S. at 260. Indeed, causation was a central issue in this case and a central portion of counsel's closing argument to the jury. (R. 1786, 1810, 1821, 1822). Conceivably, the jury could have accepted the conclusion that Petitioners deprived Respondent of his constitutional right to free speech, but that deprivation did not cause the adverse publicity or actual injury. Since it was authorized by the Judge to return substantial nonpunitive, nonncompensatory damages, the jury may have concluded all $275,000.00 was attributable to the "value" of the constitutional rights involved.

Furthermore, the jury instruction given below threatens to elevate certain constitutional rights above others. There can be no hierarchy of constitutional rights.

> We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no first without thereby establishing seconds.

Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). In *Carey* this Court held that substantial nonpunitive damages could not be returned in the absence of actual injury. The instruction given by the District Court authorized the jury to award such damages in the absence of injury for the mere deprivation of a substantive constitutional right. The instruction thus creates a hierarchy of rights. The "first" rights, by implication the "better" rights, are substantive constitutional rights (plaintiff can recover substantial noncompensatory, nonpunitive damages) while the "second" rights, the "lesser" constitutional rights, concern procedural due process guarantees.

Public policy mandates the conclusion that substantial noncompensatory, nonpunitive damages cannot be recovered in § 1983 litigation in the absence of actual injury. The jury instruction given in the case at bar authorized the jury to award such damages, whether or not Respondent was injured as a result of an alleged constitutional deprivation. The District Court erred by giving this instruction and the Court of Appeals' decision upholding this instruction should be reversed.

II.

THE DISTRICT COURT ERRED BY INSTRUCTING THE JURY IT COULD AWARD RESPONDENT SUBSTANTIAL NONPUNITIVE DAMAGES FOR THE ALLEGED DEPRIVATION OF HIS DUE PROCESS RIGHTS, CONTRARY TO *CAREY V. PIPHUS*, 435 U.S. 247 (1978)

Even if substantial nonpunitive, noncompensatory damages may be awarded for the mere deprivation of Respondent's First Amendment rights, the District Court erred by instructing the jury that it could award substantial nonpunitive damages "for the [procedural due process] deprivation" based upon the "importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right."

In *Carey v. Piphus*, 435 U.S. 247 (1978), this Court held that in the absence of proof of actual injury caused by a procedural due processs deprivation, a plaintiff would be entitled to recover only nominal damages. Implicit throughout that decision was a recognition that "causation" issues were central to a damage award in § 1983 litigation based upon a denial of procedural due process rights.

Here, the jury concluded that Respondent Stachura's procedural due process rights had been violated by Petitioners' actions. (J.A. 99). However, the jury was not asked in the special interrogatory form prepared by the District Court to determine the amount of damages attributable to Respondent Stachura's procedural due process deprivation. Rather, the jury was asked "[w]hat is the amount of nominal or compensatory damages which you award Plaintiff Edward Stachura

for the deprivation of his rights . . . ." (J.A. 100) (emphasis added). However, as counsel's closing argument demonstrates, causation was a central (if not the crucial) issue in this case. (R. 1786, 1810, 1821, 1822).

The trial court's instructions authorized the jury to award substantial noncompensatory, nonpunitive damages for the mere deprivation of Respondent's due process rights. Notwithstanding Respondent's protests, the inescapable fact is that this case was primarily a procedural due process case. *See* Complaint (J.A. 1-16).

Respondent contends that there was "no 'ambiguity' of causation" merely because "from opening statement, throughout trial, and in closing argument, Respondent insisted he was innocent of any wrongdoing." Response to Petition for Writ of Certiorari, at 3. Yet, Respondent is unable to point to any portion of the record to support his contention that the jury believed his evidence.

Whether Respondent prevailed on the causation issue regarding his procedural due process claim, this Court must first ascertain whether this jury instruction was a proper interpretation of the Court's decision in *Carey*. In light of *Carey* alone, this instruction must fall. By instructing the jury that it could award substantial damages "for the [mere] deprivation" of Respondent's due process rights, without any proof of actual injury, the District Court erred.

Conceivably, the jury may have concluded that the absence of a hearing to allow Respondent to "clear his name" contributed to or even caused the adverse publicity of which Respondent complains. However, it is equally consistent with the jury verdict to assert that the adverse publicity engendered from the events giving rise to this case was "caused" by the *public statements* of private citizens at a *public* Board of Education meeting. Thus, the resulting publicity and Respondent's

other "damages" may have borne no direct or reasonable relationship to the absence of a procedural due process hearing.

The District Court's error becomes clear even by Respondent's own argument. "Judge Harvey indicated that if the Plaintiff were found to have been deprived of a constitutional right, the jury could award 'damages to compensate him for the deprivation' and that since the value of such deprivation was difficult to measure, the jury could consider the importance of the right in our constitutional scheme and its 'significance in the context of the activities' in which Respondent was engaged when the violation took place. . . ." Response to Petition for Writ of Certiorari, at 4–5. However, this Court made clear in *Carey* that prior to an award of substantial compensatory damages, the trier of fact must conclude that the absence of a due process hearing *caused actual injury*.

> [I]f petitioners can prove on remand that "[respondents] would have been suspended even if a proper hearing had been held" . . . then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspensions. . . . The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. . . . We do not understand the parties to disagree with this conclusion. Nor do we.

Carey, 435 U.S. at 260 (brackets in original, citations omitted). Later, the Court emphasized (in discussing damages for emotional distress): "This ambiguity of causation . . . provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself." *Carey*, 435 U.S. at 263.

A substantial portion of Respondent's proofs centered on his feelings of emotional distress. It is absurd to presume that after having been given an erroneous jury instruction, an instruction directly contrary to this Court's decision in *Carey*, that the jury could disregard that instruction and award damages solely for injuries caused by the deprivation of Respondent's due process rights. As this Court has stated in other contexts, "we must assume that the jury followed the court's instructions." *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, ____ U.S. ___, 105 S. Ct. 2847, 2858 (1985).

The jury instruction given in the case at bar conflicts not only with the holding in *Carey*, but the principles articulated in *Carey* that substantial damages may be awarded only to compensate for injuries caused by a deprivation of procedural due process. In this "causation-damage" analysis, considerations of the "importance of [procedural due process] in our system of government, [and] the role which [procedural due process] has played in the history of our republic" have absolutely no relevance.

Rather than guide the jury toward a determination of what damages Respondent would be entitled to recover to compensate him for injuries caused by a deprivation of his procedural due process rights, this blatant appeal to the constitutional patriotism of the jury could easily arouse the passions and prejudice of the individual jurors and taint the entire proceeding. Once the jury was instructed to consider "the history of our republic", bringing to mind our people's great struggles and sacrifices, the jury's attention could easily turn from compensation to condemnation. A jury, sworn to uphold the Constitution and laws of this country, when instructed to award such damages by the federal judge cloaked in all his authority, wisdom and traditions of office, could have done no less. *Carey*

suggests that such patriotic considerations are improper considerations in calculating the amount of damages the Respondent requires to compensate him for the alleged deprivation of his due process rights.

Respondent may claim that the evidence supports the amount of damages awarded by the jury. Unfortunately, the instruction given by the District Court allowed the jury to impose substantial damages without the benefit of Respondent's evidence. Thus, it is impossible to ascertain whether or not the jury believed all, some, or none of Respondent's damage proofs.

The Sixth Circuit Court of Appeals presumed that all of Respondent's claimed injuries were a result of Petitioners' actions. The Court of Appeals found that "[c]ontrary to the situation in *Carey v. Piphus* . . . relied on by appellant School District, there was proof from which the jury could have found, *as it did*, actual and important damages." Petition for Writ of Certiorari, Appendix C-7. At no time was the jury asked on what basis it awarded $275,000.00 in "compensatory" damages. The Court of Appeals presumed that the jury believed Respondent's damage proofs and believed that all of Respondent's damages were caused by the deprivation of his rights. Such presumptions, without any basis in the record to support them, cannot stand.

III.

SINCE THE JURY INSTRUCTION GIVEN BY THE DISTRICT COURT IMPROPERLY AUTHORIZED THE JURY TO AWARD SUBSTANTIAL NONCOMPENSATORY, NONPUNITIVE DAMAGES WITHOUT PROOF OF ACTUAL INJURY, THE COURT OF APPEALS ERRED BY AFFIRMING THE DECISION OF THE DISTRICT COURT

The District Court's instruction improperly authorized the jury to award substantial nonpunitive, noncompensatory damages "for the deprivation" of Respondent's constitutional rights. The instruction then erroneously allowed the jury to calculate damages based upon the intangible "value" of Respondent's constitutional rights. This jury instruction applied to both substantive constitutional interests (Respondent's First Amendment claim) and procedural due process interests (Respondent's "hearing" claim). The jury instruction not only contradicted this Court's decision in *Carey*, but also the statutory language and common law principles involved in §1983 litigation.

The District Court's special interrogatories did not request the jury to apportion damages between either the substantive or procedural due process rights it found violated. Rather, the District Court's instruction authorized the jury to return a "general damages" verdict in favor of Respondent. It is therefore impossible to determine whether $275,000.00 in "compensatory" damages was awarded to Respondent Stachura as a result of his First Amendment claim or his due process claim. Any contentions to the contrary amount to little more than pure speculation.

The Court of Appeals concluded that Respondent's evidence was sufficient so that a jury "could" find substantial

and important damages caused by the alleged deprivations. The Court of Appeals then concluded that the jury "did" find such injuries were caused by the deprivations, although there is no basis in the jury's verdict to support that presumption.

Once it has been established that the Court's instructions to the jury were erroneous,[8] remanding the case for a new trial is necessary. "Ordinarily, an error in the charge is difficult, if not impossible, to correct without a retrial in light of the jury's general verdict." *City of Newport v. Fact Concerts, Inc.*, 463 U.S. 247, 256 n. 12 (1981). A new trial is required in this case because of the erroneous instruction. "[w]e must assume that the jury followed the court's instructions . . ." and awarded damages to Respondent "for the deprivation". *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, ___ U.S. ___, 105 S. Ct. 2847, 2858 (1985).

Because liability issues, causation issues, and damage issues are so interrelated in this dispute, the case must be remanded for a new trial on all issues. The standards established for determining when a new trial is required were set out by this Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931). There, the Court stated:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. . . . Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. . . . There should be a new trial of all the issues raised by the counterclaim.

[8] The instruction was erroneous either because it authorized a verdict of substantial nonpunitive, noncompensatory damages "for the deprivation" of Respondent's substantive rights, his procedural rights, or both.

Gasoline Products, 283 U.S. at 500-01 (citations omitted). *See Slater v. KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980); *Williams v. Slade*, 431 F.2d 605, 608-09 (5th Cir. 1970); *Huckman v. Allen Bradley Co.*, 587 F.2d 612, 619 (3rd Cir. 1978). Since the issue of liability is inseparable from the issue of damages and since the causation requirement for an award of damages in §1983 litigation was central to the litigation at the case at bar, this case should be remanded to the District Court for a new trial.

CONCLUSION

Petitioners, the Memphis Community School District, The Board of Education of Memphis Community Schools, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Bernice Dolan, and Donald C. Russell respectfully request this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit and remand this case to the United States District Court, Eastern District of Michigan, for a new trial.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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No. 85-410

In The

Supreme Court of the United States

October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, et al.,
Petitioners,

vs.

EDWARD J. STACHURA,
Respondent.

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

While the questions stated by Petitioners follow, with some editorializing, the questions on which petition for certiorari was granted, Respondent contends they do not fairly portray the instructions given by the District Court or the issues in fact presented for review on this record.

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No. 85-410

In The

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October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, et al.,
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vs.

EDWARD J. STACHURA,
Respondent.

RESPONDENT'S BRIEF

COUNTERSTATEMENT OF THE CASE

Mischief is invited when doctrine is so drily abstracted that it strays from the actualities which give it birth. Petitioners not only ignore the factual matrix of the decision on which they principally rely, *Carey* v. *Piphus*, 435 U.S. 247 (1978), but they so gloss the record here that the case which the jury tried and decided is hardly recognizable. Since the facts are only summarized in the opinion of the Court of Appeals, we rehearse them at greater length.

A. Petitioners' Life Science Curriculum

Respondent Stachura, married and the father of a son and daughter (133)[1], is a trained and experienced science

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[1] Since the Joint Appendix (Jt. App.) so truncates the record, numbers in parentheses, except as otherwise noted, refer to pages in the transcript in the District Court. Exhibits are those sequentially numbered and admitted in the District Court.

teacher who was first employed in the Memphis Middle School in 1977 (132, 134). During the 1978-1979 school year he taught three seventh-grade classes in Life Science (139), a course established many years before by the School Board (567), which dealt with various structures of the human body, including a unit on human reproduction (591). At the direction of his building principal (154-55), Stachura coordinated the teaching of the chapter on human reproduction (Exh. 1) in the text he was directed to use with the showing of two films[2], "From Boy to Man" and "From Girl to Woman," provided by the County Health Department (155). Also at the direction of his principal (158-63), Stachura distributed to his female students a pamphlet "Your New Self Discovery" (Exh. 5); the boys' pamphlet "A Boy Today, A Man Tomorrow" (Exh. 4) was ordered withheld by the principal, but copies distributed at Petitioners' direction in prior years were readily available to students in Stachura's class (160-61).

These materials treated the subject of human reproduction openly. The textbook described the male reproductive system in detail, stating that the prostate ". . . has a set of muscles that can contract strongly and eject sperm and semen through the penis. The *penis* is used during *coitus* . . . the process by which sperm and semen are introduced into the female reproductive system" (Exh. 1, p. 216) (emphasis in original)[3].

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[2] The movies were admitted as exhibits and shown to the jury (765-66). Although signed parental permission slips were required of Stachura's students (156), he was later accused of showing movies "without preview by the Board or parents" (Exh. 25).

[3] The boys' pamphlet more graphically states: "Sexual intercourse is the sexual union of a man and a woman. During intercourse the penis of the man fits into the vagina (opening in the body, between the legs) of the woman. Then the sperm cells pass from his body

(*continued on following page*)

The textbook similarly discusses the female reproductive system. It states that ". . . estrogen production begins during the early teenage years. It causes development of the breasts, growth of body hair, and internal development of the female reproductive system" (Exh. 1, pp. 216-17). The menstrual cycle is explained (Exh. 1, pp. 217-18), a charting of "most probable days of ovulation" is included (Exh. 1, p. 218), and the internal female organs, including the vagina, are pictured (Exh. 1, pp. 216-17). Prenatal development is also discussed, as is labor (Exh. 1, pp. 220-22). The delivery process is pictured by sequential models of a baby moving from the uterus, through the birth canal and out of the body (Exh. 1, p. 221).

The movies, shown separately to girls and boys (156), each make specific verbal and diagrammatic reference to erections, ejaculation and coitus. Masturbation is explained, and boy-girl relations addressed. The girls' pamphlet, in addition to all of the above, outlines every common method of birth control (Exh. 5, pp. 25-27), discusses venereal disease, urging prompt treatment, promises confidentiality and even provides a "toll-free VD information number" (Exh. 5, p. 27). Sexual intercourse, the "setting of standards," and what to do about "unwanted pregnancy" are also discussed (Exh. 5, pp. 19-23). Similar but shorter discussion also appears in the boys' pamphlet (Exh. 4, pp. 13-15). Both the movies and the pamphlets acknowledge the not uncommon difficulties of communicating with parents and urge the seeking of advice and counsel from a host of other reliable sources as needed (Exh. 4, pp. 15-16; Exh. 5, pp. 30-33).

(*continued from preceding page*)

into hers. Sexual intercourse is a very wonder [*sic*] emotional and physical experience" (Exh. 4, p. 13). Elsewhere it defines ejaculation as "a sudden, forceful spurt of semen from the penis. It is usually accompanied by a particular kind of pleasant sensation" (Exh. 4, p. 4).

B. Public Controversy Over Curriculum

During Stachura's teaching of this unit on human reproduction, certain parents in the school district, getting garbled reports about "goings on" in his classroom, began exchanging gossip, rumor and innuendo about Stachura's teachings. Led by Delores Truszkowski, they conferred on several occasions with the President of the School Board, Herbert Kubisch (580-81)[4], who advised them that "before you go ripping a man apart," you had to have something (778). Unfortunately, that "something" came to include a further collection of rumors, gossip and innuendo[5], "put in writing" at Board President Kubisch's recommendation for presentation to the School Board (751-55). As Kubisch unabashedly said, "that was proof enough" (796).

Virtually all of the parental complaints were directly traceable to these teaching materials (207-53) — the movies, text and the pamphlets which the School Board provided for Stachura's Life Science classes. Neither the Board nor the superintendent, however, had the slightest interest in accepting any responsibility for that to which a vocal segment of the community objected. Stachura became the Petitioners' scapegoat.

At no time was Stachura advised by any Petitioner concerning matters to be excluded or included in the course of instruction in Life Science, what questions of students germane to the course were to be left un-

[4] The jury found Truszkowski to have conspired with Kubisch to deprive Stachura of his civil rights. The claim against her was subsequently dismissed on the ground that her conduct was immunized by her Constitutional right to petition for redress of grievances. *Cf. McDonald* v. *Smith*, __ U.S. __, 53 U.S.L.W. 4789 (1985).

[5] Triumphantly, Mrs. Truszkowski presented Kubisch with the Boys' Pamphlet as evidence of Stachura's wrongdoing, though he had neither prepared it, nor distributed it to his students (752-53).

answered or what teaching techniques were to be employed to engage the interest of students or to assist them in mastery of course materials; all of these matters were committed to Respondent's professional discretion and judgment (591-92). Respondent prepared daily lesson plans available for inspection during the school year, and at no time did any Petitioner seek to review, criticize or discuss his teaching methods or course subject matter or to impose limits on his academic freedom (591-92).

The textbook from which Stachura taught was recommended by Principal Becker and Superintendent Russell and approved for use by the Board of Education (889-95, 1028); this text defined the contours of the course (881-82). Stachura was never advised that there was any policy restricting use of supplemental materials without prior approval of principal, superintendent or school board (148-49, 278-79). No Board member was aware of any such limitations (574).[6] There were no policies adopted by the Board relating to the teaching of Life Science (919-20) and the superintendent never had occasion to guide Stachura concerning the class (921-22). It was acknowledged in the pleadings that throughout the 1978-1979 school year all Petitioners failed to criticize or discuss the nature of the unit on human reproduction with Respondent in any way (591-92).

[6] A principal charge against Respondent was that he exhibited photographs he had taken of his wife during the birth of their son. The photographs were never seen by any Petitioner or their witnesses prior to production before the jury (269-70, 705-06, 941). They proved inoffensive. Stachura explained he showed them to demonstrate that childbirth was not to be inordinately feared by female students and that husbands need not desert their wives during the delivery. The use of the same photographs sparked no controversy the year before (170). They were noted in Respondent's lesson plans available for his principal's inspection (167-68).

As community unrest swelled, encouraged by President Kubisch's philosophy that "truth" was best measured by the number of citizens who showed up to complain (796), Superintendent Russell advised Kubisch that "[a] lot of these parents are going off half cocked . . ." (820-21). He was unsuccessful, however, in keeping the matter off the Board's agenda (723).

Knowing that the issue would arise at the Board's special millage meeting on the evening of April 23, 1979 (1201, 1203, 1210-11), Russell met with Stachura (197-98). Russell and Principal Becker advised Stachura that many parents were aroused by his purported teaching methods; that this had become "a very big issue in the community overnight"; that it had "blossomed" over the weekend and that Stachura was "in one heck of a lot of trouble" (198). The Superintendent said that a "lot of people" were planning to make public accusations against him (198-99) at an unusual and hot public meeting (1230). Stachura said he thought "the whole thing was a bit ridiculous" but indicated a desire to face his accusers at the meeting (199). The Superintendent responded that that was not "a good idea at all" since he did not think that Stachura's physical safety could be assured (199), saying, "[D]on't go, too many people are hot about this" (400); they are "angry, hotheads" (402). He advised Stachura to stay away for his own good (402, 1217, 1230). Stachura heeded the Superintendent's advice and did not attend the meeting (199).

C. The Board Meeting Of April 23rd

Meetings of the Memphis Board of Education normally attract eight or ten persons (783) but on this occasion Board President Kubisch not only expected a "full house" (796) but also media representatives who would report any accusations made against Stachura (801).

He discussed this in advance with Mr. Russell (940). According to Board Member Kelly, sixty or seventy people attended the meeting with people even standing at the back of the room (1279). After a millage discussion was completed, all members of the Board remained. By prearrangement with Mr. Kubisch (719), Mrs. Truszkowski rose and proceeded to read the statement she had prepared (Exh. 25).

Almost immediately there were shouts and interruptions and spontaneous comments. According to Board Member Kelly, the crowd concentrated on the "sex education part" of Stachura's classroom teaching (1281). In Mr. Kubisch's words, "human reproduction is the big scandal" and parents "harped on that" (827). One parent shouted that Stachura and Principal Becker should be "tarred and feathered" (784, 1214, 1485-86). During what was estimated to be a 45-minute session (787), the crowd became increasingly hostile (1211) and Superintendent Russell was convinced that aroused parents "were not playing games" (1217). When someone from the audience asked what was to be done, Mr. Kubisch, chairing the meeting as the spokesman for the School Board, stated that if he had a child in Stachura's class he would not allow the child to continue to attend (583-84, 802). Not surprisingly, this led to threats of mass boycott of classes (805).

Although Mr. Kubisch had earlier advised Mrs. Truszkowski that "you just can't go by hearsay" (1379), he concluded that once she had reduced the accusations to written form, he did not think "anybody would put their name on a piece of paper like that if there wasn't some ground to that" (1381). Though he had taken an oath to uphold the Constitution, he says he publicly announced to parents that he would not countenance further teaching by Stachura because he reacted to the shouted demand to "tar and feather the guy" (804).

Mr. Kubisch told the audience that because Stachura had tenure, he could not be summarily terminated (806-07), but this did not allay mounting "heat and confusion" (785). As the crowd threatened to keep their children out of school and to picket (805, 1281-82), members of the Board recognized that the threat was "serious" (1282). Although employee discipline matters are not usually handled at a public School Board meeting (1279), Superintendent Russell concluded that "the only thing that we can do was possibly suspend the teacher until an investigation could be undertaken" (1282). There was no formal vote by the Board but, as Mr. Kelly explained, "it was more or less general consensus that, yes, that would be the best thing that we could do" (1283). The Board concurred with the Superintendent's action (938-39).

Even before the April 23rd meeting, Principal Becker had conferred with two "concerned parents" who made a series of uncorroborated attacks upon Stachura which Becker apparently accepted as confirming Stachura's alleged reputation as a "sex maniac"; Becker then incorporated them in a "reprimand" he claimed to have begun on April 20th, presumably supplemented on May 10th and not delivered to Respondent until May 29th (Jt. App. 112-14; Tr. 259-61).

Media publicity following the April 23rd meeting was immediate and extensive. Stachura was branded a "sex education teacher"[7] who had been suspended for im-

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[7] Under Mich. Comp. Laws Ann. § 380.1507, Mich. Stat. Ann. § 15.41507, a school board is empowered to provide instruction in "sex education" which includes "family planning, human sexuality, and the emotional, physical, psychological, hygienic, economic and social aspects of family life." A pupil may not be enrolled in such a course unless the parent is given "prior opportunity to review the

(*continued on following page*)

proper teaching conduct (Jt. App. 101-10). President Kubisch's statement that "I wouldn't let my kid go to that class" was circulated throughout the community (Jt. App. 106) and Superintendent Russell was reported to have announced that "the formal process, required by law and contract, was begun" and a "letter of reprimand was written" (Jt. App. 102, 106). This plainly implied that Stachura was guilty of the charges the parents had made against him. These included claims that Stachura "made students look at graphic photographs of his wife giving birth" (Jt. App. 101), "touched female students" (Jt. App. 102), "[p]ut sexual drawings on the chalkboard" (Jt. App. 105), "made racial jokes" and promoted "free love" (Jt. App. 109). These allegations, vigorously denied, were never sustained, but they spread across the country and as far as Tokyo where the Pacific *Stars and Stripes* reported that Petitioners had "suspended" Respondent (Jt. App. 115).

After students in Stachura's class had completed study of human reproduction, had taken an examination on the offending chapter, and were now concerned with "skin and bones," Stachura was told by the Superintendent on April 24 to remove his personal property from his classroom since he would not "see the inside of a Memphis classroom again" (202, 1224). He advised him to resign and warned that if he did not he could "win the battle and lose the war" (202-03, 946). Stachura's ouster did not abate calumniation by Petitioners. On May 27, 1979, the *Detroit Free Press* ran an extensive

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(*continued from preceding page*)

materials to be used in the course" and notified of the right to withdraw the pupil from the course. If the Life Science course was within the statute, primary responsibility for compliance rested on Petitioners (1868-69) who did not hestitate, however, to threaten Respondent with "criminal prosecution" for violating the act (Exh. 21).

report on Respondent's problems, reiterating many of the parental charges against him (Jt. App. 122-29), a report which counsel for Petitioners subsequently endorsed (Exh. 21).

D. Stachura's Suspension "Pending Investigation"

Any investigation would have exposed the Petitioners' responsibility for encouraging what they claimed to be an illegal course in "sex education" (Exh. 21), while providing a forum for Stachura to explain and justify his teaching performance. Not surprisingly, no investigation of any sort was ever undertaken.

No Petitioner could recall anything done to investigate the allegations which underlay their removal of Stachura from the classroom (576-77); a purported "investigating committee" appointed on the night of April 23rd (587-88, 807-08) met once but conducted no investigation (673-74). Superintendent Russell, while publicly proclaiming the need for an investigation, disclaimed knowledge of any steps taken to investigate (577, 960). Yet this did not prevent the Superintendent's official letter to Respondent on May 3, 1979 advising that the "investigation is continuing" and that he would be notified of its "progress" (Jt. App. 111). Of course, there was no "progress" and no notification. Petitioners sought, instead, to keep Stachura in a limbo of uncertainty as to his status in the hope that he would "quietly go away." He had been given a "Pink Slip" nondisciplinary layoff notice a few days before the April 23rd meeting (197). Shortly before the semester ended he was summoned to the Superintendent's office and handed the "letter of reprimand" prepared by Principal Becker (261-63). When he sought to discuss the accusations against him, Superintendent Russell rejected any discussion and left the meeting (262). Stachura at first naïvely thought that this "reprimand" would close the matter; instead, Russell

made clear that "no way" would he be permitted to return to his classes (266).

Repeated efforts by Respondent's counsel to secure assurances that he would be returned to the classroom for the fall semester were unavailing[8] and accordingly this suit was filed. When immediate injunctive relief was sought, Petitioners agreed to return Respondent to employment under a consent order entered "without prejudice to the claims of any party."

E. Respondent's Damages

Petitioners' announcement of the summary suspension and the ensuing ouster of Stachura from the classroom at a public meeting deprived him of his right to a pre-termination hearing guaranteed him by the Michigan Teachers' Tenure Act, Mich. Comp. Laws Ann. § 38.71, Mich. Stat. Ann. § 15.1971, and the option to have personnel matters resolved in private, Mich. Comp. Laws Ann. § 38.104(a), Mich. Stat. Ann. § 15.2004(a) as well as the protection of the collective bargaining agreement which provided that no Memphis teacher could be "disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause" (Exh. 27). The uncorroborated charges of parents were accepted by Petitioners who both "reprimanded" him and ushered him out of the classroom in the middle of the day. In shame and humiliation Respondent was forced to call his wife, who came with his children to

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[8] Two letters to Petitioners (Exhs. 20A, 20B) were unproductive and as late as July 2, 1979 the Board "offered" only to restore Respondent to his contractual recall rights as a laid-off teacher, if he accepted the substance of the "reprimand" which he steadfastly disputed (202). Since it was then apparent that the contractual grievance procedure could not provide adequate and timely redress, Respondent resolved to institute this action.

pick him up (Jt. App. 29), after he had gathered his personal effects while his students looked on (Jt. App. 28).

Petitioners did not seek to blunt the unfounded accusations made against Respondent at the meeting of April 23 but fueled them with further comments to the media (1284, 1294). The widespread publicity given to Stachura's ouster for some sort of sexual improprieties stigmatized him and changed him from a modest teacher dedicated to his job in a small community, and comfortable there (Jt. App. 47), into a notorious public figure singled out for a "dubious achievement award" by a national publication (Jt. App. 113, 120). The community seemed to him to regard him as a pariah and this took a heavy emotional toll on him and his family (Jt. App. 49). He waited daily for the phone to ring to advise him that the promised investigation was completed with his exoneration, but it never rang, adding to his anxiety and uncertainty about his family's future (1093-94). Instead, he received innumerable crank calls, many cursing him for his reported conduct (315-16). The systematic denial by Petitioners of an opportunity to confront his accusers and their accusations and his summary ouster from his teaching duties kept him under a continuous cloud of suspicion and antagonism. His students regarded him as a "germ" (Jt. App. 46) to be shunned or the butt of rude jokes (Jt. App. 46).

When he removed him from his classes, Superintendent Russell said that Stachura "looked sick" (944, 1234). Respondent described in detail the emotional distress which was caused by Petitioners' course of conduct (Jt. App. 27-54). He recounted the anguish of having to go into his class to remove his personal things while braving the taunts or questions of his students with a replacement already at the head of the class (Jt. App. 28). He had to explain to his wife and children why he

was no longer permitted in his room (Jt. App. 29-30, 41). When he saw the newspaper articles describing his plight (Jt. App. 30), he could not believe this was happening "in America" (Jt. App. 27) and he described the pain of learning that the "garbage" being circulated about him had even reached to friends in Japan (Jt. App. 35). He recounted the anguish of having to explain what his parents had already heard about his suspension from the media (Jt. App. 36-37) and how distressed he was to have to protect his young son from what he might hear about his father (Jt. App. 41-42).

While Stachura waited to be "cleared" (Jt. App. 49-50), he broke sidewalk concrete to vent his frustration (Jt. App. 84), and took to sleeping on the floor so that his nightmares and tossing and turnings would not disturb his wife (Jt. App. 84). After the end of the school year, he survived only one day as a bartender, so fearful was he that his notoriety might spark a violent confrontation (Jt. App. 49-51). Even his return to the classroom in the fall after being publicly vilified was a new ordeal (Jt. App. 53-54). His wife, a registered occupational therapist, graphically described the repeated harassing phone calls which came to the house (Jt. App. 80-82); Respondent's sense of shame and mortification while the charges were pending unresolved against him (Jt. App. 85); his receipt of the letter continuing his suspension which caused him to be "deeply, deeply upset" (Jt. App. 88); and his continuing sense that he was a "marked man" (Jt. App. 89).

The toll which these events took upon Stachura from a professional standpoint was also marked. Whereas he had originally been a zestful teacher, participating in extra-curricular activities and seeking to interact with students and their parents outside the classroom (Jt. App. 47), Petitioners' course of conduct caused him to

stop participating in such activities (Jt. App. 48) and, as his wife observed, "his whole spirit for teaching changed" (Jt. App. 89). He did his job but "there was no joy" (Jt. App. 89).

Unrebutted expert testimony indicated that as a result of the actions taken against him, Stachura was foreclosed from a definite range of employment opportunities (860-868).

The jury, responding to special interrogatories (Jt. App. 98-100), concluded that each of the Petitioners had violated Respondent's First Amendment rights (Jt. App. 98-99); that they also deprived him of liberty and property (Jt. App. 99); and that all Petitioners had deprived him of due process of law (Jt. App. 99). The jury made detailed and distinct awards of compensatory and punitive damages against each of the seven individual Petitioners; compensatory damages were awarded against the Board of Education (Jt. App. 100).

SUMMARY OF ARGUMENT

Petitioners' persistent course of misconduct simultaneously penalized Respondent for his classroom teaching — which was well within prescribed guidelines — stigmatized him publicly, transformed him from a private to a notorious, disreputable figure, and deprived him of both substantive and procedural due process of law. This misconduct proximately caused actual damages to Respondent, including mental anguish, psychological shock and trauma, affront to his dignity and reputation, deprivation of the ordinary pleasures of life, including his zest as a professional educator, and drastic curtailment of future opportunity to pursue his teaching career. The jury's verdict compensating him for such injuries was pursuant to instructions which were fair

and comprehensive and consistent with 42 U.S.C. § 1983. The instruction which Petitioners challenge — if raised by proper objection, which we deny — was not erroneous and in no way offended the doctrine of *Carey* v. *Piphus*, 435 U.S. 247 (1978). The determination of the jury, the District Court and the Court of Appeals should accordingly be affirmed.

ARGUMENT

I.

THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY WERE NOT IMPROPER.

The District Court gave extensive instructions to the jury concerning each theory of liability and how damages were to be measured if Respondent met his burden of establishing such liability. Petitioners here wholly mischaracterize the very instruction they challenge, abstracting its few sentences out of the context of the entire charge. That Respondent was deprived of liberty and property without due process of law is here acknowledged[9], but Petitioners and the Solicitor General ask

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[9] Petitioners concede that "the jury could have accepted the conclusion that Petitioners deprived Respondent of his constitutional right of free speech" (Brief for Petitioners at 24). Their claim that Respondent was not deprived of a property interest, asserted in their Petition for Writ of Certiorari, was not entertained for review by this Court. No challenge to the jury's findings that Stachura's liberty interests were violated was ever posited by the Petition. The Solicitor General likewise concedes "Because the Court limited its grant of certiorari, we assume arguendo that respondent's constitutional rights actually were violated" (Brief for *Amicus Curiae* Supporting Petitioners at 10, n. 5). The contention of the National School Boards Association, *amicus curiae*, that Respondent had no right or interest protected by the First Amendment is not, in our view, germane to the issues delineated by this Court and we do not discuss it. *Cf. Travelers Health Assn.* v. *Virginia*, 339 U.S. 643, 651, n. 4 (1950).

this Court to override the verdict because of what we regard, at best, as a logomachic quibble in ideological raiment inapplicable to the facts at bar. We believe that this theory, like the numerous others urged by Petitioners and rejected by the District Court and the Court of Appeals, should be rejected here.

A. The Challenged Instruction Does Not Remotely Say What Petitioners Insist.

Petitioners wrongly insist that the challenged instruction[10] somehow encourages an award of "noncompensatory" damages, permits an award of "presumed" damages without proof of actual loss, invokes the doctrine of damages *per se*, and encourages an award based on the "inherent value" of a constitutional right. But, on its face, the actual text of the challenged instruction does not justify the vituperation hurled against it. The instruction says nothing of "presumed" damages, damages *per se*, "inherent value" or the like. The instruction makes no mention of "priceless" constitutional rights which some apparently regard as mere "platitudes." It emphasizes, rather, that "If you find that Plaintiff has been deprived of a Constitutional right, you *may* award damages to compensate him" — a statement which does no more than guide the jury in the exercise of its discretion in measuring injuries which may not be susceptible to conventional criteria of proof. "*In one sense,*" the court declared, "no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation" (Jt. App. 96). We do not regard the District Court's statement as misleading. The final sentence of the first paragraph, noting that because the rights are not capable

[10] The instruction is set forth at Jt. App. 96 and in Brief for Petitioners at 5.

of precise evaluation does not mean that their loss cannot be compensated, is no more than a restatement of what was acknowledged in *Carey* v. *Piphus*, 435 U.S. 247 (1978). *See also Saxner* v. *Benson*, 727 F.2d 669, 672-73 (7th Cir. 1984), *cert. granted*, 105 S.Ct. 1166 (1985); *Hobson* v. *Wilson*, 737 F.2d 1, 60-62 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1843 (1985); *Barnett* v. *Housing Authority of Atlanta*, 707 F.2d 1571, 1578-79 (11th Cir. 1983).

To the extent that Petitioners' umbrage is concentrated on the second paragraph it is equally misdirected. The jury was advised that it was within its discretion to place a "precise value" upon any constitutional right "which you find was denied." This was no mandate, but a suggestion that the jury might consider the value of the right denied as an element in the bundle of relevant "circumstances" from which it had to evaluate the extent and significance of Plaintiff's injury. "The deprivation of men's political and social rights properly may be alleged to involve damage to that [Jurisdictional] amount, capable of estimation in money," *Giles* v. *Harris*, 189 U.S. 475, 485 (1903); damages for loss of constitutional rights are "no less certain of quantification or conceptualization" than damages for simple assault. *Dellums* v. *Powell*, 566 F.2d 167, 195 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

The District Court then stated that the jury "*may wish*" to consider the importance of the right in our system of government, the history of the republic, and the significance of the right in the context of the activities in which Respondent was engaged when his right was violated. We read this as no more than a caution to the jurors neither to let their common sense desert them nor to be oblivious of the shared values of the society in which they are a part. It reminded the jurors of an aspect of their "experience" as citizens which might assist them in drawing "reasonable inferences" from the facts (1841-42)

and in "conceptualizing" the injuries which Respondent, in fact, sustained. Indeed, if compensation for damages must be "considered with reference to the nature of the interests protected by the particular constitutional right in question," 435 U.S. at 265, it is difficult to see how laymen could grasp the "interests protected" without explication of the nature of the right on which they are predicated.[11]

Only a metaphysician remote from the practicalities of trial litigation could expect a lay person to determine the amount of distress suffered as a result of deprivation of a right without giving heed to the value of the right deprived. The importance of what is lost is surely a component of any equation measuring the value of the loss, particularly when the loss is necessarily more psychological than physical. Where there is direct evidence of actual damage inflicted by an employer in discharging an employee, real injury can also be "inferred from the facts,"

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[11] Of course, if a particular jury should give these few sentences the extravagantly strained interpretation which Petitioners suggest and award excessive damages, remittitur is available to correct it. Where the amount of damages is separable from the issue of liability, as is clear from the jury's answers to special interrogatories, "partial new trial" on the issue of damages can likewise be ordered. *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931); *Devine* v. *Patteson*, 242 F.2d 828, 833 (6th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957); *Rodgers* v. *Fisher Body Division, General Motors Corp.*, 739 F.2d 1102, 1106 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 1759 (1985); *Grimm* v. *Leinart*, 705 F.2d 179, 183 (6th Cir. 1983); *Hobson* v. *Wilson*, 737 F.2d 1, 57-78 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1843 (1985); *Greenwood Ranches, Inc.* v. *Skie Construction Co., Inc.*, 629 F.2d 518, 522 (8th Cir. 1980). But such drastic "surgical intervention" with the jury's evaluation is plainly not justified in this case.

Baskin v. *Parker*, 602 F.2d 1205, 1210 (5th Cir. 1979). In light of *Carey*, another panel of the Sixth Circuit directed that a jury be instructed to consider "the nature of the constitutional deprivation, the magnitude of the mental distress and humiliation suffered by the plaintiff, and any other injury caused as a result of being deprived of federally protected rights." *Smith* v. *Heath*, 691 F.2d 220, 226 (6th Cir. 1982). In dealing with what this Court referred to as "subjective injuries," the character of the right which is jeopardized or lost is certainly relevant in evaluating the claimed consequences. We believe that this was recognized explicitly in *Carey*: "Distress is a personal injury familiar to the law, *customarily proved by showing the nature and circumstances of the wrong* and its effect on the plaintiff." 435 U.S. at 263-64 (emphasis added). Earlier in the Court's opinion, the same theme was sounded when it was emphasized that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and *their contours are shaped by the interests they protect*" 435 U.S. at 254 (emphasis added).[12]

The instruction which Petitioners condemn not only does not say what they say it says, it was never so interpreted at trial.

> Alleged errors in jury instructions are considered in the light, not only of the instructions as a whole, but of the allegations of the complaint, the opening statements, the evidence, and the closing arguments. *Alloy International Co.* v. *Hoover-NSK Bearing Co., Inc.*, 635 F.2d 1222, 1226 (7th Cir. 1980).

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[12] The plurality opinion in *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503-04 (1977) looked to the "Nation's history and tradition" in defining the contours of "substantive due process protection."

At no point during the trial or in final arguments did Respondent urge the jury to "presume" any damages or award them simply because a violation of constitutional rights had been shown. Respondent claimed he had been damaged by the deprivation of various constitutional rights, never once suggesting that damages be awarded for the "deprivation itself." In final argument, his counsel expressly indicated that while "constitutional rights are precious," he did not believe that the jury should seek to place a dollar value on a constitutional right as such (1770). Rather, he emphasized that Respondent was deprived of his right to privacy -- not to be the object of international suspicion or controversy (1745) — his right to be free from groundless stigmatization as a child molester (1746), his right to earn a living in his chosen profession without sharply-restricted employment opportunities (1749-50) and his right to express himself in the classroom within the contours of the assignment given him (1763). He emphasized that Respondent had lived with 1,144 days of human misery as a consequence of Petitioners' refusal to give him a forum where he could defend himself (1768) and that the jury had to do the best it could to provide just compensation for Respondent's injury to his constitutional rights (1770). In the light of Respondent's own closing argument, it is groundless to contend that the challenged instruction led the jury to do any of the things over which Petitioners now fantasize.

B. Petitioners' Complaints About The Challenged Instruction Are Fully Addressed By The Balance Of The Instructions On Damages.

"[I]t is not proper to select detached sentences in the charge and predicate on them an objection. They must be read in connection with the whole charge." *New York, Lake Erie & Western Railroad Co.* v. *Estill*, 147 U.S. 591,

614 (1893). "In examining the charge of the court, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages and to decide upon them, without attending to the context or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions." *The Congress and Empire Spring Co.* v. *Edgar*, 99 U.S. 645, 659 (1879). *See also Allen* v. *First National Bank of Atlanta*, 169 F.2d 221, 225 (5th Cir. 1948); *International Paper Co.* v. *Busby*, 182 F.2d 790 (5th Cir. 1950). Here, we submit, that teaching is particularly apt.

The Court read to the jurors the theories of both Petitioners and Respondent (1848-1855), and dealt with both in its ensuing instructions. The jury was aware that Respondent contended he had been punished in violation of his "freedom to speak, also characterized in the context of this case as 'academic freedom'" (1858-59), and that he had been deprived of both liberty and property without due process of law, including proper procedural due process (1870-72). The jury was informed that it would have to decide whether Stachura was in fact discharged from employment, a finding critical to his property deprivation claim (1873-74). Procedural due process elements were explained at length (1874-75) and the Court likewise explained the elements of a liberty interest in one's good name and professional reputation (1876).

The Court explained that the jury should "find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial" (1840); warned it to consider "only the evidence in the case" (1841) but indicated it could ". . . draw, from facts which you find have been produced, such reasonable

inferences as you feel are justified in the light of experience" (1842).

Extensive attention was paid to the issue of damages. The Court instructed that damages "must be reasonable" (Jt. App. 93) and that Respondent was entitled to "only such damages as will reasonably compensate him for such injury and damages as you find from a preponderance of the evidence in the case that he sustained as a proximate result of the Defendants' violation of his civil rights" (Jt. App. 93). The jury was admonished that it could not award "speculative damages" or any compensation which is "remote or conjectural, or which has not been proven" (Jt. App. 94). The object of damages, the Court further explained, was to place Respondent "in the same position he would be in if his civil rights had not been violated" (Jt. App. 94). In this regard, the jury was instructed to consider:

> [A]ny lost earnings; loss of earning capacity; out-of-pocket expenses; any mental anguish or emotional distress; that you find the Plaintiff to have suffered as a result of conduct by the Defendants depriving him of his civil rights. Although the injury produced by mental anguish or emotional distress is essentially subjective, genuine injury in this respect may be evidenced by the conduct of a person, and observed by others. (Jt. App. 94).

The Court explained when punitive damages could be awarded (Jt. App. 94) and when only nominal damages should be awarded (Jt. App. 94-5). The Court noted the difficulty in measuring damages to compensate for injury caused by deprivation of a constitutional right and gave the instruction challenged here (Jt. App. 96).

Petitioners' assertion that the challenged instruction here authorizes "noncompensatory" damages is expressly refuted by the prior instruction's admonition *not* to award speculative damages, or damages *not* proved by a preponderance of the evidence (Jt. App. 94). There is simply no escaping the fact that not only does the challenged instruction *not* say what Petitioners wish but the very fears they now conjure up evaporate when read with the balance of the Court's charge, which they deign to ignore. Fanciful speculation about how a jury might totally misunderstand and misapply a few sentences in a lengthy damage instruction, to the total exclusion of the remainder of what the jury was told to consider, is clearly inadmissible particularly when, as here, the instructions were delivered both orally and in written form for use by the jury during its deliberations (Jt. App. 92, 96; Tr. 1888).[13]

II.

PETITIONERS' OBJECTION TO THE INSTRUCTION SET FORTH IN ITS FIRST ISSUE IS NOT PROPERLY BEFORE THE COURT.

Fed. R. Civ. P. 51 provides in part that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." This Court has emphasized that

> [i]n fairness to the trial court and to the parties, objections to a charge must be sufficiently specific

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[13] Even in criminal cases where personal liberty is at stake, trials are not expected to reach some Platonic ideal of perfection in which all possibilities for human fallibility have been excluded. *Engle* v. *Isaac*, 456 U.S. 107, 133-34 (1982).

> to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. *Palmer* v. *Hoffmann*, 318 U.S. 109, 119 (1943). *Pennsylvania Railroad Co.* v. *Minds*, 250 U.S. 370, 375 (1919).

Objecting to the instruction below, Petitioners' counsel stated:

> The Court's instruction . . . I believe, asks the jury to speculate as to the value of the Constitutional right. I believe the Court in Carey versus Piphus, 435 US 247, indicated nominal damages were an appropriate measure of the deprivation of, at least in that case, a First Amendment right unless there was a showing of actual damages.
>
> It seems to me the Court's instruction . . . asks the jury to speculate as to what the value of the Constitutional right is. I don't think that's appropriate under the discussion of the Supreme Court, and we object to the giving of that instruction. (1911).

The District Court responded that it relied on *Herrera* v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981) and *Corriz* v. *Naranjo*, 667 F.2d 892 (10th Cir. 1982), *appeal dismissed*, 458 U.S. 1123 (1982). Counsel made no further comment but passed to his next objection.

Petitioners' objection in the District Court that the challenged instruction authorized the jury to "speculate" about Plaintiff's damages — is now transmogrified into a claim that damages must somehow be apportioned — either among the rights of procedural and substantive due process the jury found to have been violated or

among each of Respondent's theories of liability. *See* Brief for Petitioners at 25, 26, 31. This is a far cry from the objection presented to Judge Harvey. Neither the talismanic invocation of "jury speculation" or "*Carey*" embraced the contentions which Petitioners make here. As the court held in *Corriz*, in rejecting a similar vague general objection to the same instruction, Rule 51 does not permit holding a trial judge to a "standard of omniscience" (667 F.2d at 896).

In Michigan, where there are multiple defendants, a jury may be asked to assess separate verdicts for the amount of damages which it finds each defendant caused. *Mich. Stand. Jury Instr.* § 41.02 (2d ed. 1981). If the jury is unable to determine such separate amounts, the jury is instructed to render a verdict for the total damages against one or more defendants found to be liable. *Mich. Stand. Jury Instr.* § 41.03 (2d ed. 1981). *See Watts* v. *Smith*, 375 Mich. 120, 134 N.W.2d 194 (1965); *Meier* v. *Holt*, 347 Mich. 430, 80 N.W.2d 207 (1956); *Maddux* v. *Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961). Had Petitioners requested, by analogy, that differentiation or "disaggregation" of damages they now contend would have been appropriate, Respondent would have asked for an instruction comparable to *Mich. Stand. Jury Instr.* § 41.03 (2d ed. 1981). In this case it was not feasible to tell where Petitioners' substantive deprivations ended and where merely procedural violations of Respondent's rights began, much less how the damages might be apportioned.

The series of arrant deprivations of Respondent's constitutionally-protected interest extending over many months all contributed to the totality of his actual injuries. Each event was a contributing cause. In Michigan "there may be more than one proximate cause." The acts of one or more defendants "need not be the only

cause nor the last cause. A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence." *Mich. Stand. Jury Instr.* § 15.03 (2d ed. 1981). The rule had its analogue in federal instructions as well, 3 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 80.19 (3d ed. 1977).

Petitioners now argue that their invocation of *Carey* was sufficient to alert the trial court to their current claim that there was an "ambiguity of causation" between their actions and the injuries which Respondent suffered as a consequence of the denial to him of procedural due process. Again, this is an argument never hinted at below.

In *Carey*, the Court noted that in dealing with a deprivation of procedural due process alone, it was unclear whether any distress the students may have sustained was as traceable to the fact that they were caught *in flagrante* with a marijuana cigarette and a prohibited earring, as to the lack of a pre-suspension opportunity to be heard. 435 U.S. at 263[14]. This "ambiguity of causation" was an additional reason for requiring the students to prove "actual damage" flowing from the claimed denial of procedural due process. Petitioners made no such argument below but insisted that the damages which Stachura sustained was not caused *by them*, but by the news media. The jury's verdict put such contentions to rest. It was counsel for Respondent who requested a supplemental instruction as to causation since Petitioners, having set in motion a "chain of events," could not claim that the consequences were unforeseeable. The

[14] Here Stachura denied the accusations against him vigorously and contended that Petitioners deprived him of both substantive and procedural rights. The jury agreed and concluded that he had been proximately injured thereby. These facts clearly distinguish this case from *Carey*.

trial court felt that other instructions adequately conveyed to the jury that "there could be more than one proximate cause of the injury and damages" (1881-89) and refused to give the proposed instruction. To now contend that the "causation" issue which Petitioners vaguely argued at trial in some way correlates with the legitimate concerns voiced in *Carey* is disingenuous.

If the challenged instruction could in any way be construed to ask "the jury to speculate," such an inference was completely negated by the Court's categorical admonition to the jury "[Y]ou are not permitted to award speculative damages. This means you are not to include in any verdict compensation for loss which, although possible, is remote or conjectural, or which has not been proven." (1882). Counsel's formulation simply ignored this. He did not explain his objection or urge restatement of the instruction in a different context. He did not suggest that the instruction contained a hint of "presumed damages" or invited the jury to award damages for some abstract, intrinsic or inherent constitutional right, as distinct from the actual injuries which the Court had already emphasized were to be the measure of compensation (1882).

Petitioners' specific objections below, their own proposed instructions — and lack thereof — and their own arguments to the jury in nowise suggested the attacks they make here. Armchair after-thoughts are discountenanced by Fed. R. Civ. P. 51, whether those of the litigants or of *amici*. In dealing with Petitioners' objections, Judge Harvey noted that he was "thinking of Rule 51" (1905). We submit that the "uncompromising language" of the rule, *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 255 (1981), precludes consideration of Petitioners' first question now.

III.

THE DECISION IN *CAREY* v. *PIPHUS* CASTS NO DOUBT ON THE VERDICT HERE.

"A single act," Mr. Justice Stewart pointed out in *Owen* v. *Lash*, 682 F.2d 648, 652 n. 4 (7th Cir. 1982), "may simultaneously constitute a violation of substantive constitutional rights and of the right to procedural due process." He noted *Procunier* v. *Martinez*, 416 U.S. 396 (1973) as illustrative. *See also Ryland* v. *Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983). A similar intermingling of procedural and substantive deprivations is presented on this record. In *Carey* v. *Piphus*, 435 U.S. 247 (1978) no violation of substantive due process had been established[15] and the students, though deprived of procedural due process, made no effort to show any resulting actual injuries. The Court, understandably, held that in such circumstances they were not entitled to a substantial compensatory damage award but, "because of the importance to organized society that procedural due process be observed," they should recover "nominal damages without proof of actual injury." 435 U.S. at 267.

Carey was confined exclusively to determining the prerequisites for damage recovery for violation of procedural rights and the Court left for another day the exfoliation of requirements for recovery of other types of constitutional torts. 435 U.S. at 264-65. What was not decided was how the teaching of *Carey* might apply to other constitutional violations. Since the procedural and

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[15] The District Court stated that the students were entitled to declaratory relief and deletion of the suspensions from school records. 435 U.S. at 252. Only post-judgment did the students propose to offer evidence tending to prove the pecuniary value of each day of lost schooling. 435 U.S. at 252. The Court remanded the case for further proceedings not inconsistent with its opinion. 435 U.S. at 267.

substantive claims here were indissolubly intertwined, we see no need for embroilment in the debate as to the precise scope or limitations of *Carey*'s teaching.[16] Even assuming that *Carey* requires that a plaintiff seeking compensation for violation of any constitutional right whatever, must establish actual injuries — which seems plainly not the case — *Carey* casts no doubt on the verdict here.

As has already been shown, Stachura was summarily removed from his classroom because of what he allegedly said to his students[17], and because of rumors which Petitioners accepted as true without either proof or investigation. Not surprisingly, Stachura's unending "suspension" was thus announced publicly in circumstances which clearly stigmatized him and destroyed his professional reputation if not his career. *Cf. Paul* v. *Davis*, 424 U.S. 693 (1976). He was given no opportunity to confront his accusers, to challenge the accusations before dissemination or to clear his name until the trial of the lawsuit he was forced to institute. His anguish following such events was proximately caused by Petitioners and no one else. But Petitioners' acts also set in motion worldwide defamation and disgrace amplified by press and radio. Petitioners were well aware that the scandalous charges which they entertained would pro-

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[16] *See, e.g.*, Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 Calif. L. Rev. 1242 (1979); Note, *Damages Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 Harv. L. Rev. 960 (1980); McClellan and Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 Duquesne L. Rev. 409 (1980); Schwemm, *Compensatory Damage in Federal Fair Housing Cases*, 16 Harv. C.R.-C.L. L. Rev. 83 (1981); Note, *Presumed Damages for Fourth Amendment Violations*, 129 U.Pa. L. Rev. 192 (1987).

[17] Stachura was attacked, *inter alia*, for his "eye and facial movement" in the classroom, for the way he used the word "insertion," answering student questions, and because of the responses of students to what he allegedly said (Jt. App. 112).

voke widespread public interest and that reporters would be present at the April 23rd meeting. Ensuing publicity unquestionably provoked the harassing phone calls (Jt. App. 39-40), the dead cat left on the porch stairs (Jt. App. 91), the gallon of potato salad dumped in front of his door (Jt. App. 91), and the other hostile acts to which Stachura was then exposed. These consequences were not adventitious intervening acts of third parties but the predictable results of the scenario which Petitioners, by positive act or negative indifference, had contrived and sponsored. *See Baker* v. *Outboard Marine Corp.*, 595 F.2d 176, 183 (3d Cir. 1979). There was no "ambiguity of causation" as that term was used in *Carey*.

This Court held more than a half century ago that the "liberty" protected by the Constitution refers to the "right to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by a free people," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1922). Academic freedom has been said to be of "transcendent value to all of us and not merely to the teachers concerned," *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603 (1967), and "privacy" has been denominated a "fundamental" right "implicit in the concept of ordered liberty," *Roe* v. *Wade*, 410 U.S. 113, 152 (1973). "Due process of law is the primary and indispensable foundation of individual freedom" which "delimits the powers the state may exercise," *In re Gault*, 387 U.S. 1, 20 (1967). If, as the Court cautioned in *Carey*, the rules governing compensation for injuries should be tailored to the particular interests protected by the particular constitutional right in question, 435 U.S. at 259, massive excoriation and ridicule as a result of false statements would seem directly analogous to the interests protected by common law defamation remedies. The involuntary transformation of a private citizen into an object of world-wide notoriety would seem redressible like common

law invasions of privacy. And providing complete compensation for actual or constructive discharges of employees without "just cause" is now a familiar office of labor relations law.

Carey made clear that all forms of "mental suffering or emotional anguish" were properly subsumed in the term "distress," 435 U.S. at 264 n. 20, and can be demonstrated both by the testimony of the victim and by his conduct and reactions to his predicament as well as the testimony of others who observed him. The Court also noted that humiliation has been inferred from the circumstances and been treated as an issue of fact, 435 U.S. at 264 n. 22, though such disposition was not controlling in the case before it. We do not understand that by employing the conventional formulation of suffering and mental anguish, *see* 3 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 85.05 (3d ed. 1977), the Court was precluding a jury from considering a plaintiff's "interests and past way of life" or precluding an award "for any loss of enjoyment of life for any emotional strain or mental suffering" which proximately resulted from a defendant's wrongful acts, *Wells* v. *Colorado College*, 478 F.2d 158, 163 (10th Cir. 1973), loss of society and "the things that fathers do in the home," *McDonald* v. *Federal Barge Lines, Inc.*, 496 F.2d 1376, 1378 (5th Cir. 1974), or similar deprivations.

In Michigan under the standard instructions which have been approved by its Supreme Court, the jury is directed to "determine the amount of money which reasonably, fairly and adequately compensates" the plaintiff "for each of the elements of damage which you decide has resulted from the negligence of the defendant, taking into account the nature and extent of the injury." *Mich. Stand. Jury Instr.* § 50.01 (2d ed. 1981). The same instruction directs the jury that "If any element is of a

continuing nature, you shall decide how long it may continue." The succeeding standard instruction enumerates the elements of recoverable damages as physical pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyments, and embarrassment, humiliation or mortification. *Mich. Stand. Jury Instr.* § 50.02 (2d ed. 1981). *See Gowdy* v. *United States*, 271 F. Supp. 733, 750, 752 (W.D. Mich. 1967), *rev'd. on other grounds*, 412 F.2d 525 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1970). *Carey* does not suggest that federal remedies are to be less hospitable to affording full redress than is the common law.

Petitioners' claim, that *Carey* in some way annuls the Court's earlier and subsequent analysis of the legislative history of 42 U.S.C. § 1983, is clearly misguided. In *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), the federal remedy was deemed "supplemental to the state remedy" so that redress of a violation of constitutional rights was provided when "state law was inadequate" or "though adequate in theory, was not available in practice," 365 U.S. at 184. Certainly, the federal remedy is not now to be more restrictive than what the common law traditionally fashioned. Indeed, in *Owen* v. *City of Independence*, 445 U.S. 622, 651 n. 33 (1980), *reh'g. denied*, 446 U.S. 993 (1980), the Court lamented a suggested interpretation which could have "the deleterious effect of freezing constitutional law in its current state of development" or fail to provide incentive for aggrieved individuals "to seek vindication of those constitutional deprivations that have not previously been clearly defined." It pointed to *Carey* as indicating that Section 1983 was "intended not only to provide compensation to the victims of past abuses,

but to serve as a deterrent against future deprivations, as well." [18]

Under 42 U.S.C. § 1988, Congress directed that any deficiencies in federal remedies for civil rights violations could be filled by extension of appropriate "common law, as modified and changed by the constitution and statutes of the State" where the litigation is tried, as long as it is not inconsistent with the Constitution and laws of the United States, *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978). *See also Brazier* v. *Cherry*, 293 F.2d 401, 409 (5th Cir. 1961), *cert. denied*, 368 U.S. 921 (1971); *Ryland* v. *Shapiro*, 708 F.2d 967, 973 (5th Cir. 1983); *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1236, 1239 (7th Cir. 1984).

Michigan has long awarded damages for dignitary torts even though no economic, physical or any other specific harm was shown. *See, e.g., Johnston* v. *Disbrow*, 47 Mich. 59, 62, 10 N.W. 79 (1881), husband's outrage at rape of wife; *Rice* v. *Rice*, 104 Mich. 371, 381, 62 N.W. 833 (1895), mental anguish, mortification, injured feelings and loss of society for then-recognized alienation of affections, the court noting "[w]hen the jury have before them the social standing and character of the parties, and the circumstances of the wrong done, they have all that is proper and necessary upon which to find a verdict"; *Scripps* v. *Reilly*, 38 Mich. 10, 25 (1878), recovery of "all such damages for wounds to his pride and manly feeling as must be inferred from such a publication" of a

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[18] "Congress . . . intended to give a broad remedy for violation of federally protected civil rights," *Monell* v. *New York City Department of Social Service*, 436 U.S. 658, 685 (1978); "the existence of a statutory right implies the existence of all necessary and appropriate remedies," *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239 (1969). After referring to *Carey*, the Court has noted that in fashioning remedies it looks for guidance "first to the common law torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute," *Smith* v. *Wade*, 461 U.S. 30, 34 (1983).

newspaper article; *DeMay* v. *Roberts*, 46 Mich. 160, 166, 9 N.W. 141 (1881), damages awarded to married woman whose privacy was lost while she was confined in childbed by doctor's introduction of stranger to room, although without her knowledge, for "shame and mortification" when "deceit" was discovered thereafter; *Rivers* v. *Ex-Cell-O Corp.*, 100 Mich. App. 824, 300 N.W.2d 420 (1980), plaintiff in an action for malicious prosecution could recover for mental anguish, denial of social pleasure and enjoyments, embarrassment, humiliation and mortification and jury award of $450,000 was properly trebled under statute so requiring. In *Stowers* v. *Wolodzko*, 19 Mich. App. 115, 172 N.W.2d 497 (1969), *aff'd.*, 386 Mich. 119, 191 N.W.2d 355 (1971), the court set aside a remittitur and upheld a verdict for $40,000 for a painless "nonconsensual touching" and involuntary confinement in a hospital by the defendant psychiatrist. Even in the case of damage actions for breach of a contract touching upon rights of personality, Michigan has liberally recognized that damages may be awarded for "mental distress and suffering," injury to "feelings and reputation" and "any circumstances of indignity under which the wrong was done." *Steward* v. *Radner*, 349 Mich. 459, 469, 84 N.W.2d 816 (1957).

The common law has permitted the award of substantial damages for a wide variety of dignitary torts, even in the absence of a showing of actual injury. D. Dobbs, *Law of Remedies*, § 7.3 at 528-31 (1973). And the rule has been extended to invasions of constitutional rights beyond the traditional category of dignitary torts, as *Carey* itself acknowledges. "The commonlaw rule of damages for wrongful deprivations of voting rights" would, it was said, "be quite relevant to the analogous question under § 1983." 435 U.S. at 264 n. 22. Deprivation of freedom of conscience or religion would seem to be governed by similar considerations. In a careful

opinion, citing *Carey*, Chief Judge Curtin in *Bryant* v. *McGinnis*, 463 F. Supp. 373 (W.D. N.Y. 1978) upheld compensatory damages of $3,000 to prisoners denied the right to practice their Black Muslim religion, despite a lack of showing of any pecuniary loss. And plaintiffs denied rights under the Free Exercise clause of the First Amendment were held entitled to an "award of compensatory damages that is reasonable in light of the nature and extent of the particular invasion" in *Bell* v. *Little Axe Independent School District No. 70 of Cleveland County*, 766 F.2d 1391, 1413 (10th Cir. 1985). The court there found that *Carey* did not bar substantial recoveries for dignitary torts, even without specific proof of emotional harm, 766 F.2d at 1410, and that while denial of religious liberty was not directly analogous, it could be likened to denial of the right to vote.

Finally, Petitioners seek to undo the jury's verdict because they claim that Respondent received a "windfall" which *Carey* forbids. *Carey* had no occasion to pronounce upon such an issue and it is not raised here by the Petition for Writ of Certiorari nor this Court's grant of review. Two courts have already rejected this *in terrorem* argument which the Solicitor General (Brief for *Amicus Curiæ* Supporting Petitioners at 19) and the National School Boards Association (Brief for *Amicus Curiæ* Supporting Petitioners at 32) chorus. For wildly extravagant jury verdicts the courts have always had corrective measures; that public officials should properly be held responsible for the consequences of their illegal and unconstitutional acts is, however, no more than what "our system of government" and the "history of our republic" fairly require.

Here the jury carefully sought to allocate responsibility among the different Petitioners and to fix their liability for damages in measured proportion to what was deemed

their blameworthiness for the injuries which Respondent actually sustained. Compensatory damages ranged from $2,750 in the case of some individuals to $233,750 against the School Board itself. Punitive damages ranged from $1,000 against most of the School Board members to $15,000 against its President, Herbert Kubisch. There was nothing excessive or extraordinary about such a verdict. A Michigan employee constructively discharged by his employer for racially discriminatory reasons recovered not only for lost wages of $362,000 but approximately $500,000 for non-economic damages; despite challenge, the award was recently confirmed in *Jenkins* v. *American Red Cross*, 141 Mich. App. 785, 369 N.W.2d 223 (1985). Public officials, sworn to protect constitutional rights have no claim upon Michigan juries to be more solicitous of them when they ride roughshod over employee rights. *See also Malandris* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1167-1171 (10th Cir. 1983), *cert. denied*, 464 U.S. 824 (1983); *Rawson* v. *Sears, Roebuck and Co.*, 615 F. Supp. 1546 (D. Colo. 1985). Petitioners brought the consequences of their misconduct on themselves and, as this Court observed in an analogous context in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *See also Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562-67 (1930); *Bigelow* v. *RKO Pictures*, 327 U.S. 251, 265 (1946). This is particularly true where governmental officials in policy-making positions unite in inflicting "systemic injuries" which affront constitutional standards. *Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980), *reh'g. denied*, 446 U.S. 993 (1980).

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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No. 85-410

In The
Supreme Court of The United States
October Term, 1985

MEMPHIS COMMUNITY SCHOOLS, et al,
Petitioners,

v.

EDWARD J. STACHURA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

March 21, 1986

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SUMMARY OF ARGUMENT

I.

The fundamental principles underlying § 1983 damages awards, recognized by this Court in *Carey v. Piphus*, 435 U.S. 247 (1978), apply equally to alleged deprivations of both substantive and procedural constitutional rights. Although there are obvious differences between substantive and procedural rights, both types of constitutional rights are designed to protect essentially personal interests. The abstract value of a constitutional right is not the measure of a § 1983 damages award, but rather the personal injury or property damage resulting from an intrusion into an individual's personal interests.

II.

Petitioners properly objected to the challenged jury instruction and the trial court understood the objection.

ARGUMENT

I.

DAMAGES AWARDS UNDER § 1983 SHOULD COMPENSATE FOR INJURIES CAUSED BY INVASIONS OF CONSTITUTIONAL RIGHTS, NOT THE DEPRIVATIONS OF THE RIGHTS THEMSELVES.

The fundamental purpose underlying § 1983 damages awards is compensation for impermissible invasions of the interests protected by our constitutional rights. Absent injury to a person (including resulting mental distress injuries) or property, only nominal damages should be awarded for technical constitutional deprivations. These principles, recognized by this Court in *Carey v. Piphus*, 435 U.S. 247 (1978), apply to alleged violations of both substantive and procedural constitutional rights.[1] Although some attempt to draw simplistic distinctions between substantive and procedural constitutional guarantees, the rights contained in the Bill of Rights and the Fourteenth Amendment cannot be so neatly packaged.

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[1] Numerous lower courts have held that the principles recognized in *Carey* apply to deprivations of substantive constitutional rights. *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978), (First Amendment); *Davis v. West Community Hospital*, 755 F.2d 455, 458-59 (5th Cir. 1985), (First Amendment, equal protection and procedural due process rights); *Familias Unidas v. Briscoe*, 619 F.2d 391, 395 (5th Cir. 1980), (First Amendment); *Morrow v. Ingleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979), (unspecified "civil rights"); *Kincaid v. Rusk*, 670 F.2d 737, 745-46 (7th Cir. 1982), (First Amendment and procedural due process); *Freeman v. Franzen*, 695 F.2d 485, 492-94 (7th Cir. 1982), *cert. denied*, 463 U.S. 1214 (1983), (deprivation of liberty without due process); *Lancester v. Rodriguez*, 701 F.2d 864, 866 (10th Cir.), *cert. denied*, 462 U.S. 1136 (1983), (Eighth Amendment); *Hobson v. Wilson*, 737 F.2d 1, 59-60 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985), ("*Bivens*" Eighth Amendment claim); *Doe v. District of Columbia*, 697 F.2d 1115, 1117, *separate statements*, 701 F.2d 948 (D.C. Cir. 1983), ("*Bivens*" Eighth Amendment claim).

Recognition that § 1983 does not create arbitrary distinctions between substantive and procedural due process rights is evident in this Court's recent decision in *Wilson v. Garcia*, ___ U.S. ___, 105 S. Ct. 1938 (1985). There, the Court ruled that the federal policy underlying § 1983 required one simple, broad characterization of all § 1983 claims in order to apply state statutes of limitations. 105 S. Ct. at 1945. "The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach." 105 S. Ct. at 1947.

After concluding that § 1983 litigation should be governed by one uniform statute of limitations, the Court looked to the legislative history behind § 1983 and determined that the "atrocities" which Congress was addressing in 1871 "plainly sounded in tort." 105 S. Ct. at 1948. Although the Court recognized there were "many [potential] tort analogies", it concluded that all § 1983 claims were essentially personal injury claims. *Id.*

This Court's analysis in *Wilson* and its underlying rationale support Petitioners' contention that the "cardinal principle of damages" in § 1983 litigation, recognized in *Carey*, applies to deprivations of substantive constitutional rights. The deprivation of an intangible constitutional right itself is not "damage" compensable in a monetary award greater than nominal damages. Absent physical injury (including consequential mental distress damages) or property damage, a person deprived of a constitutional right is entitled to nominal damages, temporary and permanent injunctive relief, punitive damages (where appropriate), and an attorney's fee award.

Admittedly, there are differences between substantive and procedural constitutional rights.[2] But the basic purpose of our constitutional guarantees is the protection of personal interests — our lives, liberties, and properties. "Substantive" rights seek to protect and preserve these personal interests through, in many instances, procedural requirements.

The Bill of Rights contains many purely procedural safeguards. The Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause. . ." is a *procedure* labeled a "substantive constitutional right." The Fifth Amendment's Grand Jury Presentment/Indictment provision is also a procedure which we deem "substantive." The Self Incrimination Clause, which had its origins in the abuses of the dreaded Star Chamber, is a *procedural* right — a procedure guaranteeing conviction only upon evidence obtained from other sources.

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[2] The due Process Clause of the Fourteenth Amendment is the source of three different kinds of constitutional protection; specific "incorporated" rights found in the provisions of the Bill of Rights, a "substantive" component which bars arbitrary government action, and a procedural "safeguard" component. *Daniels v. Williams*, ___ U.S. ___, 54 U.S.L.W. 4090, 4093 (1986), (Stevens, J., concurring). Each of these "sources" of due process is essentially the same; "constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen." *Meachum v. Fano*, 427 U.S. 215, 230 (1976), (Stevens, J., dissenting). Thus, the State may not arbitrarily deprive a person of his or her liberty or property. The State must comply with notice and hearing requirements prior to the deprivation of a liberty or property interest. And, the State may not deprive an individual of liberty by imprisonment without guaranteeing that individual the effective assistance of counsel (Sixth Amendment), the right to confront his or her accusers (same), the right not to be a witness against him or herself (Fifth Amendment), the right to a Grand Jury presentment or indictment (same), the right to have warrants issued upon probable cause and particularly describing the things to be seized (Fourth Amendment), and the right not to have excessive fines imposed or cruel and unusual punishments inflicted (Eighth Amendment).

Numerous other purely procedural safeguards are preserved in the Bill of Rights: The right to a speedy and public trial, the right to an impartial jury in the state and district wherein the crime was committed, the right to be informed of the nature and cause of the accusation, the right to be confronted with witnesses, the right to compulsory process for obtaining witnesses, and the right to the effective assistance of counsel. All these are *procedures*, yet individually and collectively they comprise the very essence of our constitutional liberty.

Respondent and *Amicus* ACLU attempt to draw irrelevant distinctions between substantive and procedural constitutional rights. They appear to argue that substantive constitutional rights are "worth more" than procedural constitutional liberties and, thus, this Court should permit an award of substantial compensatory damages for the deprivation of intangible substantive rights absent proof of consequential personal or property injury. Yet, this Court has recognized that procedural constitutional guarantees, particularly the right to procedural due process, are as important as substantive constitutional rights and liberties. *In re Gault*, 387 U.S. 1, 20-21 (1967).[3]

There can be no doubt that the freedoms guaranteed by our Constitution are *all* equally important to the preservation of constitutional democracy. Petitioners do not suggest, as some naively do, that there can be simplistic distinctions between substantive and procedural constitutional rights. This Court recognized in *Carey v. Piphus*, 435 U.S. at 262, that one purpose of procedural due process is to convey to individuals a

[3] "Our system of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said, 'The history of American freedom is, in no small measure, the history of procedure.'" *In re Gault*, 387 U.S. at 20 (footnotes omitted).

feeling of just treatment, thus recognizing that the values underlying "procedural" due process transcend *pro forma* notice and hearing requirements. *See also Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162 (1951), (Frankfurter, J., concurring.)

In other contexts this Court has recognized that there is a common thread or "theme" running through the Bill of Rights. Whether this common bond is referred to as "penumbras, formed by emanations of those guarantees", *Griswold v. Connecticut*, 381 U.S. 479 484 (1965), as "implicit in the concept of ordered liberty", *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), as the "basic civil rights of man", *Loving v. Virginia*, 388 U.S. 1, 12 (1967), or as some unspecified quintessential character of liberty is not relevant. The essence of our constitutional guarantees is a limitation on the government to prevent it from unnecessarily intruding upon an area of personal liberty and personal interest. It is the invasion of the personal interest which constitutes the compensable injury in a § 1983 case, not the constitutional deprivation itself.

In asking this Court to affirm the Sixth Circuit Court of Appeals' decision, *Amicus* ACLU suggests that the *Carey* decision can be "explained" because due process rights are only "triggered" by a deprivation of a liberty or property interest. This is little more than a truism. But *Amicus* argues that since the underlying constitutional right primarily concerns personal or property interests, it is appropriate to look at the deprivation of those interests in determining an award of damages. This novel approach to constitutional litigation rests on a fundamentally unsound assumption. *Amicus* ACLU assumes that the violation of a substantive constitutional right can be determined in isolation without regard to the alleged impact of the contested action upon individuals.

In many cases it cannot be determined whether government action has resulted in a constitutional deprivation until

the impact of that government action upon an individual can be assessed. A police officer's search may violate the Fourth Amendment, but *Katz v. United States*, 389 U.S. 347, 360 (1967), (Harlan, J., concurring) demonstrates that the initial inquiry must often focus on whether the individual has exhibited a *subjective* expectation of privacy. *See also Smith v. Maryland*, 442 U.S. 735, 740 (1979). It is in this way that the Fourth Amendment recognizes and protects an individual's privacy interest. A damages award for a deprivation of that privacy interest must focus on the resulting injury caused by the invasion of privacy, rather than on the technical deprivation.

Similarly, government action may violate an individual's right against self-incrimination, but this can only be determined by looking to the specific individual affected and determining whether that individual was *compelled* to be a witness. *South Dakota v. Neville*, 459 U.S. 553 (1983); *Fisher v. United States*, 425 U.S. 391, 397 (1976). Again, in awarding damages for an action based upon compelled self-incrimination, it is appropriate to look to the impact of the government action on the individual, not the technical deprivation of an abstract right.

Additionally, government action may violate the First Amendment if that action compels an individual to express belief in an idea or concept. *Wooley v. Maynard*, 430 U.S. 705 (1977). But again, in this context it is the impact of the government's actions upon the individual which determines whether or not there has been a constitutional violation, and a jury should be instructed to examine only the impact of the government's action on the individual in determining compensatory damages.

Both Respondent and *Amicus* raise additional arguments in their attempts to support the lower court's decision. *Amicus* ACLU argues that this Court's prior "voting rights" decisions support an award of substantial noncompensatory damages for deprivations of substantive constitutional rights without proof of injury to Plaintiff [illegible]'s property. However, this Court has never held that an individual can be awarded substantial damages for the mere deprivation of the right to vote. Rather, the Court has ruled only that a civil action may be maintained in federal court, "and it has not considered the prerequisites for recovery." *Carey*, 435 U.S. at 264-64, n. 22.[6]

Amicus relies upon *Ashby v. White*, 92 Eng. Rep. 126 (K.B.), *rev'd*, 1 Eng. Rep. 417 (1703), as support for the "common law rule" that an individual may recover substantial damages absent proof of actual injury for denial of the right to vote. However, a reading of *Ashby* reveals that it primarily concerned a dispute between branches of government over which branch should ultimately decide the validity of Parliamentary

[6] While it may be appropriate to award substantial noncompensatory damages to an individual deprived of the right to vote on the basis of race, this rationale is called into serious question if the denial of voting rights is based on misapportionment of legislative districts. *Reynolds v. Sims*, 377 U.S. 533 (1964). Under such circumstances, where thousands of people may have had their votes "diluted", an award of substantial noncompensatory damages to all "injured" parties could threaten financial ruin.

elections.[5] Although dicta in the King's Bench decision suggests that an award of substantial damages was justified, the final decision rendered by the House of Lords did not reflect whether this reasoning was adopted. The House of Lords merely reinstated the trial court's judgment — hardly an act worthy of weighty precedent in the context of this case.

Respondent also argues that his case is closely analogous to a defamation action and, thus, it is appropriate to award substantial damages absent proof of actual injury.[6] This precise argument was addressed in *Carey v. Piphus*, 435 U.S. at 262, where the Court emphasized that defamation is "an oddity of tort law."

Amicus further suggests that this Court should authorize substantial nonpunitive, noncompensatory damages for the deprivation of a constitutional right absent proof of actual injury in order to enhance the "deterrent value" of § 1983. Deterrence is a legitimate purpose in § 1983 litigation, but this

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[5] In a footnote to the reported House of Lords decision, it was written:

> Scarce any judicial determination ever occasioned such a disturbance in both Houses of Parliament as the present. For, on the 25th day of January 1704, the House of Commons resolved itself into a committee upon this business; and, after a very long and animated debate, the committee came to the five following resolutions. . . .

Ashby, 1 Eng. Rep. at 418. Each resolution dealt with the exclusive right of the House of Commons to determine and examine elections of their members unless otherwise authorized by Act of Parliament.

[6] Although Respondent now claims that his "anguish . . . was proximately caused by Petitioners and no one else," Respondent's Brief, at 29, this contention represents a substantial change in his position. Respondent also claimed (at various times) that Patrick Dishinger (dismissed prior to trial, J.A. iii), Marilyn Moore, Robert Phillips, Charles Becker, (against whom the jury found no liability, Petition for Certiorari, at A-1-3) and Delores Truszkowski (JNOV granted and affirmed, Petition for Certiorari, at B-9, C-3) were also responsible.

Court has recognized that deterrence has never been the predominant goal behind § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-68 (1981). Nothing in § 1983's legislative history suggests that Congress envisioned the creation of a deterrent more powerful than that inherent in punitive damages. *Id.* Additionally, it is difficult to understand how an award of $233,750.00 against a local school district (which may ultimately be borne by local taxpayers) fosters any kind of "deterrence" at all. *Cf. City of Newport, supra.*

This Court's decision in *Carey* supports Petitioners' contention that § 1983 does not authorize an award of compensatory damages for the deprivation of a constitutional right *per se*. Section 1983, and the principles underlying it, support damages awards based upon injuries caused by constitutional deprivations. Although Respondent and *Amicus* ACLU argue that this Court's decision in *Carey* is somehow different and inapplicable to substantive constitutional rights, neither has been able to articulate a principled distinction.

For these reasons and the reasons set forth in Petitioners' Brief on the Merits, Petitioners respectfully assert that the jury instruction given in the case at bar was erroneous and the decision of the United States Court of Appeals for the Sixth Circuit must be reversed.

II.

PETITIONERS TIMELY AND ADEQUATELY OBJECTED TO THE CONTESTED JURY INSTRUCTION

Respondent challenges the sufficiency of Petitioners' objection to the contested jury instructions, arguing that the objection was insufficient for purposes of FED. R. CIV. P. 51. "The problem with respondent's argument is that the District Court in the first instance declined to accept it." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255 (1981).

After the jury was excused to select a foreperson, the trial court gave all parties an opportunity to make objections for purposes of Rule 51. J.A. 97. As Respondent's counsel reminded the District Court, the trial court had already given counsel an opportunity to discuss the proposed jury instructions off-the-record in chambers prior to noting objections for the record. Respondent's counsel noted that Respondent understood the court's position in regard to the objections and would not "propose to fill up the record with further discussion, unless you desire it." *Id.*

When Petitioners' counsel was given an opportunity to place Petitioners' objections on the record, counsel objected to the contested instruction by specifically drawing the district court's attention to *Carey v. Piphus*, 435 U.S. 247 (1978). The trial court obviously understood the nature of Petitioners' objections to that instruction and expressly relied upon two Court of Appeals decisions which ruled that *Carey* did not prohibit the "intrinsic value" instruction. J.A. 98.

FED. R. CIV. P. 51 "does not require formality, and it is not important in what form an objection is made. . . as long as it is clear that the trial judge understood the party's position; the purpose of the Rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them."

Wallace v. Ener, 521 F.2d 215, 218 (5th Cir. 1975), (quoting *Moore's Federal Practice* treatise). *See also Louisville & Nashville R.R. Co. v. Farmer*, 220 F.2d 90 (6th Cir. 1955); *King v. Rockport S.S. Co.*, 30 F.R.D. 349, 350–51 (WD MI 1962); *Employers' Liability Assurance Corp., Ltd. v. Maes*, 235 F.2d 918, 922 (10th Cir. 1956), ("The exceptions were not as precise as they might have been and were somewhat argumentative, but they were called to the attention of the court and it was fully understood by the court that the defendant desired the exceptions.").

The fact that Petitioners' counsel drew the trial court's attention to this Court's decision in *Carey* and the trial court's reliance upon the two leading "intrinsic value" damages cases as support for the contested instruction undermine Respondent's argument that a proper objection was not made.

Even if the objection did not meet the requirements of FED. R. CIV. P. 51, the trial court and the Court of Appeals addressed the merits of Petitioners' objections. *See* Petition for Writ of Certiorari, *Memorandum Opinion and Order*, B-8. *Stachura v. Truszkowski*, 763 F.2d 211, 214 (6th Cir.), *cert. granted sub nom* 106 S. Ct. 245 (1985). Under these circumstances, it is appropriate to consider the merits of the issue before this Court. "because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

CONCLUSION

Petitioners, the Memphis Community School District, The Board of Education of Memphis Community Schools, Herbert Kubisch, Genevieve Walters, Margaret Guoin, Timothy Kelley, Lawrence Delekta, Ernest Beaudrie, Bernice Dolan, and Donald C. Russell respectfully request this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit and remand this case to the United States District Court, Eastern District of Michigan, for a new trial.

Respectfully submitted,

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Dated: March 21, 1986

AMICUS CURIAE

BRIEF

No. 85-410

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IN THE
Supreme Court of the United States
October Term, 1985

Memphis Community Schools,
Petitioners,

v.

Edward J. Stachura,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONERS

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No. 85-410

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Memphis Community Schools, et al.,
Petitioners,

v.

Edward J. Stachura,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief amicus curiae in support of Petitioners is submitted with the written consents of counsel to all parties.

Letters of consent are on file with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators.

They are responsible under state law for the fiscal management, staffing, continuity, educational productivity and standards of conduct of the public schools within their jurisdictions.

School boards, like other state and municipal entities, are frequently named as defendants in 42 U.S.C. § 1983 actions alleging constitutional violations. The recent proliferation of § 1983 suits has in part caused the insurance industry to shy away from providing liability insurance to school districts or to charge exorbitant premium rates which many financially strapped districts can ill afford. If school districts cannot obtain liability insurance, they must absorb the heavy impact not only of litigation costs but also any damage awards assessed against them.

Amicus in no way seeks to absolve school districts of their responsibility for any actual injury they may cause to a plaintiff as a result of a constitutional deprivation. Rather, amicus submits this brief in the belief that affirmation of the opinion below will create a disastrous precedent for school districts by allowing plaintiffs to collect excessive damage awards wtihout prerequisite proof of injury. Such a prospect will only magnify the severity of the problems school districts now face in securing liability insurance coverage or unjustifiably increase the damage awards school districts must pay out of their own pockets.

ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred in approving the district court's jury

instruction authorizing damages based upon the "intrinsic value" of both substantive and procedural due process rights involved.

2. Whether elementary and secondary school teachers possess a right of "academic freedom" under the first amendment.

STATEMENT OF THE CASE

The facts in this case are complex. For purposes of this brief, amicus refers this Court to the facts as set forth in the parties' Joint Appendix. For the purpose of its discussion of the "intrinsic worth" instruction, amicus' brief assumes arguendo that a constitutional violation existed.

On the question of "academic freedom," amicus submits that since the "right" does not exist at the elementary and secondary

level, no facts could exist to support a finding of a violation of the "right" to "academic freedom."

ARGUMENT

I. INTRODUCTION

The jury instruction now before this Court for review permits damages to be awarded solely on the basis of the intrinsic worth of both procedural and substantive constitutional rights without regard to whether any injury resulted to the respondent from the allegedly offending actions of the school board. Such an instruction ignores this Court's admonition in Carey v. Piphus, infra, to tailor common law tort principles to damages issues in cases involving constitutional claims. The instruction certainly fails to inform the jury that compensatory damages should be awarded in

order to redress injury suffered by the claiming party. Furthermore, the instruction flies in the face of the specific holding in Carey by allowing damages to be awarded for the inherent worth of procedural due process rights.

The Sixth Circuit Court of Appeals did not address these flaws in the instruction, but instead upheld the damages award on the ground that the respondent had proved sufficient injury at the hands of the school board to justify the jury's award. Amicus contends that the mere possibility that the jury awarded damages on the basis of injury and not on its assessment of the intrinsic value of the constitutional rights at issue provides an inadequate ground for affirming the damages award. However, the possibility that the jury did award

damages based on the trial court's defective instruction certainly warrants reversal.

The second question accepted for review by this Court, "[w]hether the Court of Appeals erred in affirming the decision of the District Court," potentially encompasses a wide range of issues.

Amicus assumes that in agreeing to hear this question, the Court did not intend to re-evaluate the jury's finding that the school board actions violated the respondent's first and fourteenth amendment rights. However, because the Sixth Circuit Court of Appeals assumed without discussion that the respondent possessed a right of "academic freedom" under the first amendment, potentially broad readings may be attached to this case. In the event that this Court

chooses not to determine this issue definitively, amicus respectfully requests that the Court make clear that its silence in this regard should not be interpreted as support for the proposition that public school teachers have a first amendment right of "academic freedom" that they may use in the classroom carte blanche simply because their lesson plans and teaching materials have been pre-approved by school administrators.

II. JURY INSTRUCTION AUTHORIZING DAMAGES BASED UPON "INTRINSIC VALUE" OF BOTH SUBSTANTIVE AND PROCEDURAL CONSTITUTIONAL RIGHTS IS REVERSIBLE ERROR.

Given the widely divergent renditions of the facts in this case, amicus takes no position as to the constitutionality of the school board's actions. Consequently, amicus also abstains from any judgment as to the liability of the school board for

any actions it took in reference to the respondent.

Obviously, the contested instruction applies only in situations where the jury first determines that some constitutional violation occurred; therefore, amicus will make its remarks regarding the propriety of the jury instruction from a position assuming arguendo constitutional violations.

The district court erred in instructing the jury that it could award damages for the deprivation of a constitutional right based on the value of the right itself without reference to whether the deprivation caused any injury to the plaintiff. The objectional instruction informed the jury as follows:

> If you find that the Plaintiff has been deprived of a constitutional right, you may

> award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon constitutional rights can measure their importance in our society or compensate a citizen adequately for the deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.
>
> The precise value you place upon any constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right. (emphasis added)

Amicus contends that the instruction constitutes reversible error for several

reasons: 1) it conflicts with the principle that compensatory damages are intended to redress an injury to the pla ntiff; 2) it permits the jury to award damages for the deprivation of procedural due process rights regardless of actual injury, contrary to the holding in Carey v. Piphus, 435 U.S. 247 (1978); and 3) although the jury might have based the damages award solely on the i-jury which it deemed the plaintiff to have suffered as a result of the school board's actions, that possibility would not rectify the blatant error in the instruc:ion.

Amicus urges this Court to reaffirm its holding in Carey with regard to procedural due process violations and to extend the tort compensation prin:iple of damages to deprivations of substantive constitutional rights. To do otherwise by

affirming the lower court opinions in the case at bar would create a disastrous precedent allowing plaintiffs who have suffered no injury at all to collect substantial damages.

A. Damage awards in cases involving constitutional violations should compensate plaintiffs for injuries caused by the deprivation.

In Carey v. Piphus, supra, this Court recognized the "the basic purpose of §1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.." Id. at 254. The Court emphasized that this principle derives from the maxim of Anglo-American law that compensatory damages should be awarded only for an injury caused to the plaintiff by the defendant's breach of duty. Id. at

254-55, citing, 2 F. Harper & F. James, Law of Torts § 1299 (1956) (footnote omitted). The Court then acknowledged the applicability of this principle to suits brought pursuant to §1983; quoting from Wood v. Strickland, 420 U.S. 308, 319 (1975), the Court stated that damages may be recovered under § 1983 when the defendant's action is "'found... to have been violative of ... constitutional rights and to have caused compensable injury.'" Id. (emphasis added by Carey Court).

While the Court in Carey recognized the limitations of applying common-law tort rules to damages issues in § 1983 actions, the Court emphatically stated that these rules provided the "appropriate starting point" to determine fair compensation for injuries resulting from

constitutional violations. The Court then instructed judges to tailor the rules governing compensation for deprivation of constitutional rights to the interests protected by the particular right in question.

Clearly, the lower court in the case at bar did not heed these directions. The district court's instruction informed the jury to take into account considerations irrelevant to the question of injury. Rather than directing the jury to consider whether any injury occurred to the plaintiff as a result of the defendant's actions and providing guidelines to determine fair compensation for those injuries, the instruction improperly allowed the jury to award damages to the plaintiff simply on the basis of a subjective assessment of the worth of the

constitutional right in question, without regard to actual injury.

The instruction conveys the clear message that the deprivation of a constitutional right itself is sufficient injury to justify an award of substantial damages. The district court stated to the jury that "no monetary value we place upon constitutional rights can measure their importance..." Any reasonable jury could interpret this to mean that it should award damages in an amount sufficiently large to reflect its own assessment of the importance of the right - i.e., "because the deprivation is constitutional in nature, the jury might infer that the award itself must be of constitutional magnitude." Bell v. Little Axe Independent School District, 766 F.2d 1391, (10th Cir. 1985) (Barrett, J.,

dissenting in part). Thus, the instruction misleads the jury by authorizing it to award damages for the deprivation itself and not for any consequential injuries flowing from the deprivation.

Not only did the instruction ignore the basic tort doctrine of awarding compensatory damages as redress for injuries suffered by a claimant, it also failed to make any distinction between the different constitutional rights at issue in the case. The instruction cannot even pretend to tailor tort principles to fit the particular right in question. The court simply lumped all constitutional rights together and then instructed the jury to use the same erroneous criteria to assess damages for each deprivation the jury found to have occurred. Even a court

that suggested that the deprivation of a first amendment right may be implicity harmful stated that in awarding damages in cases asserting constitutional violations "[t]he jury cannot simply be set loose to work at i[ts] discretion informed only by platitudes about priceless rights." Dellums v. Powell, 566 F.2d 167, 195-96 (D.C. Cir. 1977). In the instant case the jury received no more guidance than that - "platitudes about priceless rights" which understandably may have lead them to award the respondent damages in a sum corresponding solely to an assessment of the value of the constitutional rights rather than to the injuries actually suffered by the respondent.

Since the instruction does not require the jury to base the damages award on injuries that may have occurred to the

respondent as a consequence of the school board's action, the district court's only legal basis for the instruction must have been either that: 1) injury can be presumed from the fact that a deprivation of a constitutional right occurred; or 2) that regardless of whether any injury occurred at all, compensatory damages should be awarded for the deprivation of the constitutional rights by virtue of the value of the rights themselves and in order to deter violations of constitutional rights.

In Carey v. Piphus, supra, this Court specifically rejected these arguments; it held that injury may not be presumed in cases of procedural due process violations - i.e., actual injury must be proven to justify an award of compensatory damages. In regard to the "inherent value"

argument, the Court stated that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect;" 435 U.S. at 254 (emphasis added).

As to the deterrence argument, the Court found no evidence that Congress in passing 42 U.S.C. § 1983 meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. Id. at 256. The deterrence argument rests on the assumption that the greater the punishment for infringing a citizen's constitutional rights, the less likely others will risk the imposition of the sanction for committing constitutional infractions. But as the Court recognized in Carey, compensatory damages under 42

U.S.C. § 1983 are intended to redress injury caused by the deprivation of a right and not to punish. If a § 1983 defendant deserves to be punished, the plaintiff may prove the necessary prerequisites for punitive damages. Smith v. Wade, 103 S.Ct. 1625 (1983).

While admittedly the Court did not address these remarks to a situation involving a violation of substantive constitutional rights, the underlying principles equally apply to such deprivations. As the Court observed in Carey, presumed damages are an "oddity of tort law," 435 U.S. at 252, citing, Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Presumed damages may apply only when the defendant's acts "are virtually certain to cause injury... and...[the] injury is extremely difficult to prove."

418 U.S. at 373. Thus, the "non-presumption of substantial damages for violations of constitutional rights is the rule rather than the exception in 1983 actions." Bell v. Little Axe, 766 F.2d at 1414 (Barrett, J., dissenting).

Assuming arguendo that a first amendment violation did occur, respondent cannot persuasively contend that serious injury is "virtually certain" to result from every deprivation of a first amendment right or that the types of injury that may occur defy proof in a court of law.

While amicus does not suggest that the respondent failed to prove any injury (see Part II C, infra,) the inapplicability of presumed damages to this case must still be addressed since the instruction implies that even in the absence of proven injury,

the jury could still award damages for any constitutional violation it deemed to have occurred.

The second legal rationale that the district court may have relied upon in giving the objectionable instruction assigns inherent value to any constitutional right which must be recompensed whenever a deprivation occurs, whether or not any consequential injuries flowed from the act of deprivation. Of course, amicus does not dispute that first amendment rights are invaluable individual liberties which merit protection from governmental infringement. (However, the nature of the first amendment right asserted here is subject to dispute. See Part IV, infra). But whether first amendment rights are valuable is not the issue; the issue is whether the intrinsic

worth of those rights properly serves as a basis for awarding damages when the right is deprived but no consequential injury results. Amicus contends that it does not.

Those courts which have awarded damages for violations of substantive constitutional rights without requiring proof of compensable injury have always distinguished Carey on the ground that the Supreme Court's holding in that case applies only to deprivations of procedural due process rights. These courts go on to emphasize that Carey requires an analysis of the interests the particular right protects and that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to

compensate injuries caused by the deprivation of another." Carey, 435 U.S. at 264-65.

These statements correctly characterize the holding of this Court in Carey; however, they do not acknowledge that the Court in Carey required proof of compensable injury inspite of the fact that the Court recognized the value of due process rights in our society. In speaking about absolute rights in general the Court observed:

> "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time it remains true to the principle that substantial damages should be awarded only to compensate actual injury, or in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."

Id. at 266. The Court never suggested that the value of substantive rights (as opposed to the value of procedural rights) warrants departure from traditional tort principles governing damages.

However, the disputed instruction in the instant case errs in exactly this manner: it instructs the jury to award damages on the basis of the value of the right. It is difficult, if not impossible, in reviewing this Court's decisions on the first amendment and the due process clause to perceive meaningful distinctions between the worth of the two rights. Putting aside the fact that the instruction does not distinguish between procedural and substantive constitutional rights, amicus suggests that in the absence of such distinctions, the district court has no justification for side

stepping the Carey decision.

If one compares the actual damage suffered by the plaintiff in Carey v. Piphus, supra, where the student merely lost a few days of school to the injuries asserted in the instant case, where the teacher alleges that he has been subjected to derision in the community and the national press in the most humiliating and excruciating manner, if proved to be true, one might conclude that the first amendment right is superior to the due process right. However, if one compares the actual injury in a first amendment case such as Fricke v. Lynch, infra, where a student is merely denied the right to go to a student dance, with a due process case where the plaintiff asserts that his livelihood has been taken from him, one might conclude that the due process right

is the more important than the first amendment right. These cases should not be separated from their facts; that is the importance of the right will always depend on the nature of the injury to the plaintiff.

It is not the value of the right in some abstract sense which should control; rather it is the injury resulting to the plaintiff which should determine the award of damages. Given that this Court has not suggested any historical basis for holding the due process clause to be less important than the first amendment, the district court should have instructed the jury to determine whether the school board infringed the respondents rights and, if so, what injury the plaintiff suffered because of that infringement.

B. The instruction permits damage awards for the denial of procedural due process regardless of actual injury, contrary to the holding in Carey v. Piphus.

That the district court erred in its instruction to the jury in regard to damages for constitutional violations becomes clear in its obvious conflict with the holding in Carey v. Piphus. The instruction as given allows the jury to award damages for the intrinsic value of procedural due process rights, a practice forbidden by this Court in Carey. The district court's failure to draw a distinction between procedural and substantive constitutional rights in giving this instruction compounded the misinformation the jury received with respect to permissible damages awards in cases involving constitutional violations and thus increased the likelihood that the

jury awarded improper damages based on this misstatement of the law. While amicus takes the position that the instruction errs with respect to substantive violations, it is indisputable that it conflicts with case law already firmly established by this Court.

C. Although the jury's award of damages in this case may have in fact been based on consequential injuries to the respondent, the instruction still constitutes reversible error.

The Sixth Circuit Court of Appeals upheld the jury's award of damages in this case based on the court's conclusion that the respondent did in fact prove substantial injury to justify the amount of damages. The appeals court then recited the injuries which it felt supported the award. Amicus does not dispute that if the jury correctly found

that the school board violated respondent's constitutional rights and if the jury then awarded damages based on injuries suffered by the respondent which were proximately caused by the school board's actions, then the jury's award would be legally irreproachable, except perhaps on the ground of excessiveness. The issue in this case, however, is not whether the respondent proved that he suffered any injury that would justify the damages ultimately awarded by the jury. The issue is whether the jury received proper instruction as to the considerations it could make in determining an award of damages. It is possible that the jury may have awarded the damages based only on its determination of the injuries it found the respondent suffered as a result of the

school board's actions. But it is equally possible that the jury awarded at least some of the damages in question here based on the district court's blatantly erroneous statement of the law. The possibility that the jury ignored the faulty instruction does not provide sufficient reason to uphold the award. But the possibility that the jury followed the court's defective direction most certainly warrants reversal.

III. AN AFFIRMATION OF THE JURY INSTRUCTION WOULD CREATE A PRECEDENT PROMOTING A SUBSTANTIAL INCREASE IN § 1983 LITIGATION AND EXCESSIVE DAMAGE AWARDS AGAINST SCHOOL DISTRICTS

An affirmation by this Court of the first amendment damages instruction would undoubtedly lead to an increase in damage awards by juries, even where there is no actual damage to the plaintiff. Many

first amendment cases against school boards do not involve significant actual damages, even when "pain and suffering" are included in the calculation.

For example, Fricke v. Lynch, 491 F.Supp. 381 (1980) involved a male homosexual high school senior who sought an injunction directing school officials to allow him to attend the senior prom with a male escort. The court held that the school board's action violated the plaintiff's first amendment rights and ordered the board to allow him to attend the function. In Bowman v. Bethel-Tate Bd. of Educ., 610 F.Supp. 577 (D. Ohio 1985), the court upheld the first amendment right of third graders to stage a play which the board had ordered to be halted. In Stanton v. Brunswick School Dept., 577 F.Supp. 1560 (1984) a high

school student was granted injunctive relief against school officials who had refused to allow the inclusion of a quotation next to the student's picture in the school yearbook. This Court has agreed to hear this term the case of Bethel School District No. 403 v. Fraser, 755 F.2d 1356 (9th Cir. 1985) cert. granted, No. 84-1667 (U.S. Oct. 7, 1985). In that case the plaintiff sought an injunction against the school board for its refusal to allow him to be considered as a graduation speaker. He was granted the injunction but received only a minimal damages award.

In each of these cases, the primary relief sought was an injunction. Nevertheless, if the plaintiffs had also sought damages and if the jury had been instructed as it was below, the cases are

likely to have yielded a substantial windfall to each of the plaintiffs.

In the leading case involving first amendment rights of students, Tinker v. Des Moines School District, 393 U.S. 503 (1969), the plaintiffs sought "nominal damages" and an injunction directing the board to rescind its order against wearing black armbands in protest of the Viet Nam War. It is a certainty that, had the plaintiffs believed that an instruction like that used below would have been appropriate, their damages claim would have been significant.

Amicus must also draw to the Court's attention the fact that local school districts, as well as other governmental bodies, are having increasing difficulty obtaining liability insurance coverage. That difficulty stems primarily from

complex financial problems in the industry which have caused insurance companies to look very closely at public entities.

To gain some sense of the problems faced by school districts in obtaining insurance coverage, amicus conducted a survey of its membership consisting of the fifty state school boards associations. The survey results showed that the problem of obtaining adequate insurance at a reasonable price is severe. In a third of the responding states, at least some of the local school districts have been unable to obtain liability insurance during the past year. Those states include Tennessee, Texas, Florida, Virginia, New Mexico, Massachusetts and New Hampshire. Even in states reporting that liability coverage has been found, several members stated that premium prices

doubled or tripled over the last four years. For example, in Alaska prices have jumped 200-300%; in Oregon, 300%; in Florida, 100-150%; in Georgia, 100%.

The results of NSBA's survey have been confirmed by other sources. The Attorney General of the State of Idaho, Mr. Jim Jones, recently testified before the United States Senate. He stated:

> Due in no small part to the proliferation of Section 1983 and 1988 attorneys fees claims a governmental insurance crisis has been precipitated in Idaho and virtually every other jurisdiction in the country. Governmental entities in Idaho and many other states have recently been informed that they are either not insurable or that continued coverage will entail doubled or tripled premiums.

Testimony of Idaho Attorney Jim Jones, Constitution Subcommittee of the Judiciary Committee, U.S. Senate, October 8,

1985.

Assuredly an instruction like that used below, if affirmed by this Court, would significantly increase the d'fficulty already faced by school districts in obtaining coverage. Given the incorrect belief by plaintiffs in the "deep pockets" of school districts, every possibility for a suit for damages as the result of the most insignificant first amendment slight, would result in a lawsuit. When insurance companies are cancelling school district policies in school districts such as Seattle, Washington, Los Angeles, California and Denver, Colorado where the districts have made no claims against their policies in the last five years, one can easily imagine what will happen if juries receive a carte blanche to award damages to

plaintiffs in first amendment cases. To an industry which understands liability based on injury, the prospect of liability without the precondition of proof of injury plays havoc with every assumption operating in the insurance field. Companies leary of providing insurance coverage to school districts will have every incentive to completely refuse coverage or else to superimpose additional premiums on already skyrocketing rates.

IV. PUBLIC SCHOOL TEACHERS' FIRST AMENDMENT RIGHTS DO NOT INCLUDE "ACADEMIC FREEDOM" IN THE CLASSROOM.

In view of the lower courts' apparent acceptance of a public school teacher's right to "academic freedom" under the first amendment, amicus feels compelled to comment upon the nature of the first amendment right asserted in this case.

The fact that public school teachers have first amendment rights in the classroom does not translate into a right of "academic freedom." If "academic freedom" does constitute a first amendment right, then it applies only at the collegiate level and not to teachers in elementary and secondary school classrooms.

The district court instructed the jury that a public school teacher has a right of "academic freedom" limited by the right of the school board to control the substantive content of the curriculum in order to promote certain community values. The lower court stated that the first amendment protects the instructor's teaching methods as long as these methods do not subvert the substantive values the school board seeks to inculcate. Based on

these statements of the law, the jury determined that the Memphis school board violated Stachura's right of "academic freedom."

It is certainly true that teachers enjoy certain first amendment rights in the classroom. For example, in James v. Board of Education, 461 F.2d 566 (2d Cir. 1972), the court ruled that the school board could not dismiss a teacher for wearing a black armband in class, an act perceived as a private exercise of free speech with no repercussions upon students and one that engendered no community protest. This Court has also invalidated state statutes which restricted the expression of teachers or other state employees as citizens rather than as teachers. E.g., Givhan v. Western Line, 99 S.Ct. 693 (1979); Sweezy v. New

Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952). However, these standards attempted to control political or social activities of teachers unrelated to their professional responsibilities.

No doubt, the decisions cited above would have been different had the speech in question been related to curricular matters. That is, the free speech rights of teachers in the classroom do not encompass the notion of "academic freedom" in the sense that teachers may conduct discussions with students in any manner they choose so long as they have obtained prior approval of the substantive content of their lesson plans. This is particularly true at the level of elementary and secondary education where the students "may not be mature enough to

deal with academic freedom as understood or practiced at a higher educational level." East Hartford Education Association v. Board of Education, 562 F.2d 838, 843 (2d Cir. 1977). What may constitute "academic freedom" at the university level may not be protectable at the lower education levels. Adams v. Campbell City School District, 511 F.2d 1242 (10th Cir. 1975).

The Second Circuit in East Hartford properly recognized that local school boards have an interest in teaching basic community values. The district court in the instant case also acknowledged this interest in the instruction it gave to the jury but erred in characterizing it simply as a limit upon the teacher's first amendment rights in the classroom when in fact this interest controls the parameters

of those rights in regard to curricular matters.

The board has the authority to set the educational curriculum based on its determination of a sound educational philosophy. This authority includes the power to specify what subjects should be taught, what issues may be covered in discussing a particular topic, subjects which should not be taught and what areas should receive particular emphasis. That the respondent understood and accepted this principle cannot be disputed. He sought approval of his teaching materials from his superiors in the school where he taught. He recognized the right of school administrators to pre-screen classroom materials for suitability.

While prior approval of curriculum provides an important means by which

school boards promote the inculcation of community values, the board's control over what is taught in public school classrooms does not stop at that point. School administrators may exercise close supervision of a teacher's pedagogic methodology. A principal may sit in on class discussions to review a teacher's performance. This review extends not only to questions of competency but also to the appropriateness of the substantive content of a teacher's presentation to his students. Those teachers who overstep the bounds of propriety and decency as drawn by the surrounding community may be disciplined by the school board. The school board not only has prior "script" approval rights, it also has the right to reject any forms of delivery or any "ad-libs" that do not conform to the

policies and regulations set by the board. The action a school administrator takes in such instances may simply be to inform the teacher to refrain from repeating the offensive conduct in the future in conducting their classes.

Amicus recognizes, however, that the board may not exercise its disciplinary powers in this regard if it fails to inform the teacher of the boundaries of acceptable classroom discussion. The teacher must have notice of the board's policies and regulations governing the substantive content of the school's curriculum. Nor may a teacher who carefully follows a pre-approved course of instruction be arbitrarily disciplined by a school board. But in cases where a school board attempts to discipline a teacher without first providing notice of

board policies or imposes a sanction without providing the requisite due process procedures, the teacher may suffer a due process deprivation but not the deprivation of a right of "academic freedom."

Without too much effort one can imagine a scenario where a school board could justifiably discipline a teacher for improper conduct in the classroom. Whether respondent in this case in fact overstepped the line of decency remains a matter of dispute. What is clear is th the jury under a misconception of the law found, and the court of appeals affirmed, a deprivation of a first amendment right that the respondent never had.

Because the Sixth Circuit Court of Appeals' opinion alludes to an infringement of the teacher's right of

"academic freedom" as a basis for the damages award, amicus urges this Court, in the absence of a ruling on the issue of "academic freedom," to indicate that its decision should not be interpreted as support for the proposition that public school teachers have the freedom to present in any manner they choose topics and materials given prior approval by a school board.

V. CONCLUSION

The Sixth Circuit Court of Appeals upheld the jury award in this case upon the mere assumption that the jury awarded damages by taking into account only the injuries that it believed the school board inflicted upon the respondent. Because the court made this assumption, it did not address the propriety of the jury instruction contested in this case. There

is no more reason to accept the court of appeals' assumption than to believe that the jury, following the district court's erroneous instruction, assessed damages for the value of the first amendment itself. The possibility that the jury acted in accordance with the instruction warrants an examination of the soundness of the underlying proposition that constitutional deprivations in and of themselves without regard to consequential injury merit compensatory damages. For the reasons stated above, amicus urges this Court to reject that proposition and to adjudge the instruction in this case to be reversible error.

The court of appeals also assumed without discussion that a public school teacher has a right of "academic freedom" under the first amendment. While such a

concept may have a place in higher education, it should not be transplanted to lower educational levels where the necessity of school board control over curriculum matters is clear. Amicus requests this Court to disavow in its opinion any support for the existence of such a right for teachers in public elementary and secondary schools.

Respectfully submitted,

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BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1985

MEMPHIS COMMUNITY SCHOOLS, ET AL., PETITIONERS

v.

EDWARD J. STACHURA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred by approving a jury instruction authorizing the award of substantial damages under 42 U.S.C. 1983 based on the intrinsic value of the procedural and substantive constitutional rights at stake without regard to actual injury.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

———

INTEREST OF THE UNITED STATES

This case concerns the correct measure of damages under 42 U.S.C. 1983 for alleged violations of constitutional rights. Under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), federal officials may be held liable in many of the same circumstances and to a similar extent as are state and local officials under Section 1983. Since the Court's decision may affect the determination of damages that may be awarded against federal officials for acts committed in the course of their employment, the United States has a clear interest in this case.

STATEMENT

1. During the 1978-1979 school year, respondent was a tenured teacher in the Memphis, Michigan Community School District responsible for teaching life science to seventh grade students. In April 1979, respondent showed his students two films concerning human reproduction. These films, which were provided by the county health department, had been shown for a number of previous years in the Memphis schools. Respondent used an approved textbook and the principal had approved his teaching methods. Pet. App. C4-C5.

Respondent's presentation of the films prompted a protest by a group of parents. At a regularly scheduled public school board meeting on April 23, 1979, several parents vehemently criticized respondent. In view of the disruptive situation, the superintendent of schools suspended respondent with pay. The school board approved the suspension on May 21 pending further inquiry. On May 29, the superintendent formally reprimanded respondent. The board subsequently advised respondent that his teaching contract would not be renewed unless he accepted the letter of reprimand. Pet. App. C5-C7.

2. a. Respondent commenced this action in the United States District Court for the Eastern District of Michigan, seeking damages under 42 U.S.C. 1983 from petitioners, the school district, the board of education, and various school board members and administrators.[1] Respondent alleged that petitioners violated his First Amendment right to academic freedom and deprived him of property and liberty interests without due process.[2] At trial, the district court instructed the jury on damages as follows (J.A. 96):[3]

> If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place on Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

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[1] The jury found in favor of certain of the individual defendants, and they are not before the Court. Respondent also sought damages from two parents who protested his teaching methods. The jury returned a verdict in favor of one of the parents and against the other, Delores Truszkowski. The district court granted judgment notwithstanding the verdict in Truszkowski's favor, and the court of appeals affirmed. Pet. App. B9, C8. Respondent did not cross-petition from this aspect of the judgment. James MacDonald, one of respondent's students, joined him in the action. The jury found for the defendants on his claims, and he did not appeal. *Id.* at B1, B2.

[2] Pursuant to a consent decree, respondent resumed his teaching duties during the 1979-1980 school year. Br. in Opp. 8-9.

[3] The court also instructed the jury that the award should "reasonably compensate [respondent] for such injury and damage as [the jury found] * * * that he sustained as a proximate result of the [petitioners'] violation of his civil rights," and the court directed the jury to consider such injuries as "loss of earning capacity; out-of-pocket expenses; and any mental anguish or emotional distress." J.A. 93, 94.

> The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.

The jury awarded a total of $266,750 in compensatory damages and $36,000 in punitive damages against petitioners. The great portion of the compensatory award, $233,750, was against the board of education; the remainder of the compensatory damages and all of the punitive damages were against the individual petitioners. Pet. App. A1-A2.[1]

b. The district court denied petitioners' motions for judgment notwithstanding the verdict and for a new trial on damages or a remittitur. Pet. App. B1-B10. The district court found evidence to support respondent's First Amendment claim that petitioners unjustifiably suspended him in retaliation for his teaching methods, which the district court found were entitled to constitutional protection. *Id.* at B3-B4. The district court also concluded that respondent had a property interest in his employment and a liberty interest in his good name and that there was evidence to show that these interests had been infringed without adequate notice or an opportunity to

[1] Including the award of $8,250 in compensatory damages and $10,000 in punitive damages against defendant Truszkowski, who successfully moved for judgment notwithstanding the verdict, see note 1, *supra*, the total jury award was $275,000 in compensatory damages and $46,000 in punitive damages.

be heard. *Id.* at B4-B6. The district court justified its damages instruction on the basis of "the mental anguish, destruction of reputation, and personal humiliation which arguably flowed from the [petitioners'] actions." *Id.* at B8. Finally, the district court concluded that there was sufficient evidence of malice to support the award of punitive damages and that the total award was not excessive. *Id.* at B7, B8.

3. The court of appeals affirmed primarily for the reasons stated by the district court. Pet. App. C1-C8. With respect to damages, the court of appeals stated (*id.* at C7):

> [T]here was ample proof of actual injury to [respondent] Stachura both in his effective discharge by the Memphis Community School District and by the damage to his reputation and to his professional career as a teacher. Contrary to the situation in *Carey* v. *Piphus*, 435 U.S. 247 (1978), relied on by [petitioner] School District, there was proof from which the jury could have found, as it did, actual and important damages.

The court of appeals concluded that the award was not excessive in light of the embarrassment, harassment, and damage to his career suffered by respondent. Pet. App. C8.

SUMMARY OF ARGUMENT

In *Carey* v. *Piphus*, 435 U.S. 247 (1978), this Court held that substantial damages may be awarded for violations of constitutional rights under 42 U.S.C. 1983 only to the extent of compensating plaintiffs for the actual injury, if any, that they suffered. This rule accords with the Court's consistent understanding that Section 1983 "create[s] 'a species of tort

liability.'" *Smith* v. *Wade*, 461 U.S. 30, 34 (1983); see, *e.g.*, *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). The Court made clear in *Carey* that under Section 1983, as under tort law generally, the focus in awarding damages must be on the harm to the interests protected by the rights in question, not on the rights themselves.

The jury instruction approved by the court of appeals in this case resulted in the award of an extravagant sum of money merely on the basis of the jury's unguided assessment of the intrinsic value of the constitutional rights that were claimed to have been violated. This standardless approach is unfaithful to *Carey*, grants needless windfalls to plaintiffs, and imposes unjustified and unforeseeable liability on government officials and agencies. "The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights." *Dellums* v. *Powell*, 566 F.2d 167, 195-196 (D.C. Cir. 1977) (Wright, J.).

There is no warrant for limiting the principles enunciated in *Carey* to violations of procedural due process. The difficulties inherent in granting juries the authority to award substantial damages based on the perceived worth of constitutional guarantees rather than on the harm actually suffered by the plaintiffs are present to the same degree when substantive rather than procedural norms have been violated. Presumed damages are inappropriate because actual injury is neither virtually certain to result in every case of a constitutional violation nor incapable of proof where it has occurred. Moreover, even where a presumption of damages might be appropriate, the award should still be designed to compensate the plaintiffs for the injuries that they are assumed to have suffered, not the value of the rights that were violated.

The harm resulting where jury awards are not grounded in compensatory principles is amply shown by this case. Although respondent was not deprived of a day's pay and indeed was reinstated to his teaching duties, he was awarded well over a quarter of a million dollars. While the courts below noted various harms that respondent may have suffered, they did not undertake to measure respondent's actual injury or to determine whether those harms were in fact attributable to petitioners' conduct. Even if they had, that was of course a function for the jury in the first instance, to be carried out upon proper instructions. The awards of large sums of money that predictably will follow upon instructions such as the one in this case upset the balance that the Court has carefully crafted between fairly compensating plaintiffs and avoiding unduly chilling government agencies and officials. The award in this case reasonably furthers neither compensatory nor deterrent purposes. The jury instruction on which it was based should be rejected.

ARGUMENT

AN AWARD OF SUBSTANTIAL DAMAGES FOR CONSTITUTIONAL VIOLATIONS MUST BE BASED ON ACTUAL INJURY, NOT ON THE FACT-FINDER'S ASSESSMENT OF THE INTRINSIC VALUE OF THE CONSTITUTIONAL RIGHTS AT STAKE

1. a. In *Carey* v. *Piphus*, 435 U.S. 247 (1978), the Court held that plaintiffs could not recover substantial damages under 42 U.S.C. 1983 for a violation of their right to procedural due process in the absence of proof of actual injury. The Court started from the premise that "'[t]he cardinal principle of damages in Anglo-American law is that of *com-*

pensation for the injury caused to plaintiff by defendant's breach of duty.'" *Id.* at 254-255, quoting 2 F. Harper & F. James, *Law of Torts* § 25.1, at 1299 (1956) (emphasis in original; footnote omitted). Consistent with this premise, the purpose of an award under Section 1983 is "to compensate persons for injuries caused by the deprivation of constitutional rights." 435 U.S. at 254.

The Court's reliance in *Carey* on the common law tort principle of compensation is in accord with its general understanding of Section 1983 as a statute that "creates a species of tort liability." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). Thus, "[i]n the absence of more specific guidance, [the Court] look[s] first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute." *Smith* v. *Wade*, 461 U.S. 30, 34 (1983); see also, *e.g.*, *Pierson* v. *Ray*, 386 U.S. 547, 556 (1967) (citation omitted) (Section 1983 must be "'read against the background of tort liability'"); cf. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 408-409 (1971) (Harlan, J., concurring in the judgment) (analogizing cause of action for damages under the Fourth Amendment to common law tort actions). As the Court held in *Carey*, there is no warrant for departing from the common law—and indeed every reason not to do so—with respect to the award of damages for constitutional violations under Section 1983. See 435 U.S. at 253-257.

In elaborating on the compensation principle in the context of damages for constitutional violations, the Court reasoned in *Carey* that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their

purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." 435 U.S. at 254. Accordingly, the Court held that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular rights in question." *Id.* at 259. The Court refused to allow presumed damages, which it characterized as an "'oddity of tort law,'" for violations of procedural due process. *Id.* at 262, quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Rather, the Court held that plaintiffs may recover substantial damages only where they can prove actual injury, which could encompass such harm as emotional distress. *Id.* at 262. While "essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others." *Id.* at 264 n.20. An award of substantial damages would therefore be proper, the Court concluded, where the jury was "guided by appropriate instructions" and the damages were "supported by competent evidence concerning the injury." *Ibid.*

Absent proof of actual consequential injury, the Court held that plaintiffs are limited to an award of nominal damages. Through such an award, "the law recognizes the importance to organized society that [certain 'absolute'] rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights." 435 U.S. at 266.

b. The court of appeals quite plainly departed from this Court's teachings in *Carey* v. *Piphus* in affirming the award of damages in this case. The damages

instruction directed the jury to assess the value of the constitutional rights at stake and to make its award based on this assessment. *Carey* teaches, however, that damages must be based not on the rights themselves, which "do not exist in a vacuum," but on the "interests protected by" those rights. 435 U.S. at 254, 259. Rather than focusing the jury's attention on the interests furthered by opportunities for notice and hearing and by a protected zone of "academic freedom,"[8] the district court invited the jury to speculate, in its "discretion," on "the importance of the right[s] in our system of government" and on the "role" that they have played in the history of our republic." J.A. 96. See also *Corrigan* v. *Naranjo*, 667 F.2d 892, 897 (10th Cir. 1981), cert. dismissed, 458 U.S. 1123 (1982); *Herrera* v. *Valentine*, 653 F.2d 1220, 1227-1229 (8th Cir. 1981). Such speculation is completely foreign to the premises on which compensatory damages are awarded in this country, for the intrinsic importance of the right that was violated bears no necessary correlation to the actual harm, if any, suffered by the plaintiff.[9]

Measuring damages by the intrinsic value of the constitutional rights at stake not only is a wholly in-

[8] Because the Court limited its grant of certiorari, we assume arguendo that respondent's constitutional rights actually were violated.

[9] It would be odd indeed if the jury were instructed in a garden variety battery case, for example, that the plaintiff's compensatory damages were to be based on the value of the right to bodily integrity rather than on his lost earnings, medical expenses, and pain and suffering. Cf. *Dellums* v. *Powell*, 566 F.2d at 195. There is no warrant for a completely different approach merely because the source of a particular right is the Constitution rather than a statute or the common law.

appropriate means of compensating plaintiffs, it would also have significant and sometimes catastrophic consequences both for private defendants who may be sued under Section 1983 or *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),[7] and for municipalities. See pages 19-20 & note 17, *infra*. As this Court has recognized, "once the door is opened to * * * inquiries" into the relative importance of a right, "it is difficult to limit their scope in any principled manner." *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 11. These difficulties are of course exacerbated when jurors, who generally are untrained in the law, are called upon, with no real guidance, to make substantial damages awards based only on their own perceptions of the worth of various constitutional gurantees.

Judge Wright has correctly observed that "[t]he jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights." *Dellums* v. *Powell*, 566 F.2d 167, 195-196 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978).[9] Rather,

[7] The principles enunciated by the Court in *Carey* apply equally to *Bivens* actions against federal employees. *Doe* v. *District of Columbia*, 697 F.2d 1115, 1123, sep. opinions, 701 F.2d 948 (D.C. Cir. 1983); see generally *Bivens*, 403 U.S. at 195 (Harlan, J., concurring in the judgment) (purpose of remedy is to compensate for injury to interests protected by constitutional rights); cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (no distinction between official immunity in Section 1983 actions and in *Bivens* actions); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978) (same).

[9] In *Dellums*, the court of appeals held that an award of $7,500—two orders of magnitude less than the award in this case—was "totally out of proportion to any harm that [was] suffered" as a result of a violation of First Amendment rights. 566 F.2d at 196.

the instructions must "require the jury to focus on the loss actually sustained by the plaintiffs." *Ibid.* See also, *e.g.*, *Bell* v. *Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1416 (10th Cir. 1985) (Barrett, J., dissenting) ("there must be some rational basis to guide jurors in measuring damages"); *Hobson* v. *Wilson*, 737 F.2d 1, 61 (D.C. Cir. 1984) (footnote omitted) (the inquiry "must not wander from the quantum of injury to protected interests into a consideration of the 'inherent value' of the constitutional right"), cert. denied *sub nom. Brennan* v. *Hobson*, No. 84-1139 (Mar. 25, 1985); *Doe* v. *District of Columbia*, 697 F.2d 1115, 1122-1123 (noting the many "problems associated with leaving juries free to guess at the 'inherent value' of constitutional rights"), sep. opinions, 701 F.2d 948 (D.C. Cir. 1983); *Freeman* v. *Franzen*, 695 F.2d 485, 492-494 (7th Cir. 1982), cert. denied, 463 U.S. 1214 (1983); *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980); *Davis* v. *Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978). An "intrinsic worth" instruction utterly fails to guide the jury's discretion, and it deprives reviewing courts of any meaningful basis on which to determine whether a particular award was excessive. For all these reasons, the instruction given in this case is deeply flawed.

2. It has been suggested that the principles established by the Court in *Carey* are limited to allegations of procedural violations and do not apply to damages for violations of substantive constitutional norms. See *Corris* v. *Naranjo*, 667 F.2d at 897; *Herrera* v. *Valentine*, 653 F.2d at 1228 (*Carey* is "specifically limited to its facts"); *Koncak* v. *Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979), cert. denied, 444 U.S. 1016 (1980). Even if valid, this distinction is not a sufficient basis on which to affirm the judgment of the

court of appeals, since the jury instruction permitted the award of substantial damages without actual injury even for the alleged violations of procedural due process, in direct contravention of the square holding in *Carey*.[9]

In any event, the distinction is unsupported by the Court's reasoning in *Carey* or by considerations of sound policy. See 435 U.S. at 253-259; *Hobson* v. *Wilson*, 737 F.2d at 60; *Lancaster* v. *Rodrigues*, 701 F.2d 864, 866 (10th Cir.), cert. denied, 462 U.S. 1136 (1983); *Doe* v. *District of Columbia*, 697 F.2d at 1123; *Freeman* v. *Franzen*, 695 F.2d at 493. The difficulties inherent in permitting juries to roam free, awarding extravagant sums of money on the basis of their perceptions of the importance of various constitutional rights, are no less where the rights are substantive rather than procedural.[10] Moreover, such

[9] The district court appeared to suggest that this objection had not been preserved because petitioners did not request separate findings on damages with respect to each of respondent's claims. See Pet. App. B8. However, petitioners' objection to the damages instruction on the basis of *Carey* (J.A. 98) surely was sufficient to alert the district court to the issue, and in any event the instruction constituted plain error insofar as it applied to respondent's procedural claims. Although respondent alleged violations of both substantive and procedural due process (see J.A. 12), it seems clear from the opinions of the courts below that they considered that only respondent's procedural rights to notice and an opportunity to be heard had been violated. See Pet. App. B6, C8.

[10] There certainly is no basis for concluding that the procedural rights embodied in the Fifth and Fourteenth Amendments are somehow less important or deserving of vindication than are substantive constitutional rights. To the contrary, "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347 (1943); see also, *e.g.*, *Marshall* v.

a distinction contravenes the principle of compensation that the Court held in *Carey* must be the foundation for any award of substantial damages under Section 1983 in light of that statute's purpose and legislative history. See 435 U.S. at 254-257. The Court therefore made it abundantly clear in *Carey* that with respect to violations of any right, substantive or procedural, damages "must be considered with reference to the nature of the interests protected by the particular constitutional right in question." *Id.* at 265. Thus, the question is not whether the *right* is an important one and if so, how important, but whether the *interests* protected by the right justify a presumption of substantial damages.

Carey left open the possibility that presumed damages might be appropriate with respect to violations of some substantive constitutional provisions. See 435 U.S. at 265. However, presumed damages may be appropriate only where, at the very least, the nature of the protected interests is such that actual harm to those interests is both "virtually certain" to follow whenever there is a violation and "extremely difficult to prove." *Carey*, 435 U.S. at 262; see also *id.* at 264. That is simply not the case here or indeed with respect to the vast majority of interests protected by the Constitution. See, *e.g.*, *Lancaster* v. *Rodrigues*, 701 F.2d at 865-866 ("upon a proper showing actual damages, if present, can be established in any constitutional violation case, and can be recovered").[11] Actual and provable harm may,

Service, Inc., 446 U.S. 238, 243 (1980) (footnote omitted) (noting the "powerful and independent constitutional interest in fair adjudicative procedure").

[11] In its cases addressing common law actions for wrongful deprivations of the right to vote, such as *Nixon* v. *Herndon*, 273 U.S. 536 (1927), the Court "has not considered the prerequisites for recovery" of substantial damages. *Carey*, 435 U.S. at 265 n.22.

but need not, accompany deprivations of procedural due process, as the Court concluded in *Carey*, 435 U.S. at 262-264 & n.20. The same may be said of those interests in freedom of expression and conscience that are protected by the First Amendment. See, *e.g.*, *Bell* v. *Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1415 (Barrett, J., dissenting); *Hobson* v. *Wilson*, 737 F.2d at 61-62. Cf. *Doe* v. *District of Columbia*, 697 F.2d 1115, 1122-1123 (presumed damages not available under Eighth Amendment); *Lancaster* v. *Rodrigues*, 701 F.2d at 866 (same).[12] Where no actual harm has been suffered in cases alleging violations of these rights, plaintiffs are limited to nominal damages under *Carey*.

Some courts nonetheless have concluded that presumed damages are necessary because rights often are violated without causing actual injury and therefore, in the absence of presumed damages, those viola-

[12] Indeed, in this very case both courts below concluded that the evidence showed actual injuries that respondent had suffered. Pet. App. 88, C7-C8. Settled law would have permitted respondent to recover, on proper instructions, compensatory damages to whatever extent those injuries were attributable to unconstitutional conduct on the part of petitioners. The jury in fact received a substantially correct statement of the law of compensatory damages earlier in the district court's instructions. J.A. 93-94. There was simply no warrant for the additional instruction on the intrinsic value of constitutional rights, which could only have hopelessly confused the jurors to the extent that they considered themselves free, as the instruction authorized, to base the entire award on their own notions of value rather than on the actual harm suffered by respondent.

tions "would remain unredressed." *Herrera* v. *Valentine*, 653 F.2d at 1228 n.7. This reasoning is completely unpersuasive. In the first place, if actual injury commonly does not accompany constitutional violations, that is an argument against, not for, presumed damages. See *Carey*, 435 U.S. at 262. Second, in the absence of actual injury, there is no harm to be redressed by an award of substantial damages.[15] Where the jury wishes to register its disapprobation of the defendant's conduct and to reaffirm the value of the rights in question, it may properly award nominal damages. *Id.* at 266.

Furthermore, as the Court made clear in *Carey*, presumed damages cannot be justified on deterrence grounds: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." 435 U.S. at 256-257. There are also other means available to ensure compliance with constitutional norms and to deter future violations, such as equitable relief and punitive damages, *id.* at 257 n.11, both of which respondent received in this case.[16]

Finally, even if damages might be presumed in certain situations, the appropriate jury instructions still

[15] We note that respondent was never deprived of his income and that he was permitted to resume his teaching duties pursuant to a consent decree, thus drastically limiting whatever actual harm he might otherwise have suffered.

[16] The prospect of liability for attorney's fees in Section 1983 actions "provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore [constitutional] rights." *Carey*, 435 U.S. at 257 n.11.

would not be based on the intrinsic value of the rights in question. Rather, the plaintiff simply would be relieved of his burden of proving actual injury, which would be presumed. The appropriate measure of damages would be the harm to protected interests that is likely to have been caused by the defendant's conduct: even presumed damages are at least "'purportedly compensatory.'" *Carey*, 435 U.S. at 262, quoting *Gertz*, 418 U.S. at 349; see also 435 U.S. at 265. There is no warrant for the wholly standardless approach approved by the courts below of inviting the jury to speculate in the abstract as to the relative worth of various constitutional guarantees and to award substantial and unforeseeable sums of money on the basis of the outcome of that speculation.

3. The mischief that predictably will result if juries are not guided by compensatory principles is well illustrated by this case. Because he was suspended with pay, respondent did not suffer the greatest deprivation that reasonably could be expected to flow from an unconstitutional discharge, *i.e.*, the attendant loss of income. Cf. *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 11 (footnote omitted) ("[I]n those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay."). Yet the jury—having been instructed to award damages based on its assessment of the value of the constitutional guarantees of the First and Fourteenth Amendment—"compensated" respondent with an award of more than a quarter of a million dollars.

Even if respondent did, as the courts below concluded, suffer such harms as "mental anguish" (Pet. App. 88; see also *id.* at C7-C8), it is difficult to con-

ceive of how such an extravagant award could reasonably be related to those injuries. Moreover, not only is the extent of respondent's actual injuries subject to substantial doubt, petitioners' causal responsibility for them is as well.[15] And even if the award could have been upheld on the basis of the injuries identified by the courts below had the jury been properly instructed, a new trial is nonetheless required because the jury was not properly instructed and therefore was permitted to assess damages not to compensate respondent for his injuries but rather on the erroneous basis of the intrinsic worth of the constitutional rights that were claimed to have been violated. See, *e.g.*, *Doe* v. *District of Columbia*, 697 F.2d at 1125; see generally, *e.g.*, *City of Oklahoma City* v. *Tuttle*, No. 83-1919 (June 3, 1985), slip op. 13 (plurality opinion), *Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931).[16]

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[15] Neither court below attempted to distinguish those harms that might have been caused by the First Amendment violation from those attributable to the procedural due process violation. Nor did the courts distinguish those injuries legitimately traceable to petitioners' actions from those independently caused by third parties; the "crank phone calls and refuse left on [respondent's] porch," for example, would seem to fall into the latter category. See generally *Martinez* v. *California*, 444 U.S. 277 (1980); *Williams* v. *Bennett*, 689 F.2d 1370, 1391 (11th Cir. 1982), cert. denied, 464 U.S. 932 (1983). These inquiries should have been performed—first, of course, by the jury on proper instructions—in order to provide a proper basis for any award of substantial compensatory damages.

[16] *Doe* v. *District of Columbia* is directly on point. There, as here, portions of the instructions suggested that damages should be measured by the actual harm that was suffered, but other parts permitted the award to be based on the value of the rights at stake. 697 F.2d at 1122. The court in *Doe* held

Respondent's windfall carries a heavy social cost. This Court has acknowledged "the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs." *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976). When those mistakes result in an infringement of constitutional interests, this Court has not hesitated to make appropriate remedies available to the wronged party. At the same time, through the development of official immunity, see, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and limitations on the exposure of local governmental bodies, see, *e.g.*, *City of Oklahoma City* v. *Tuttle*, *supra*; *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court has been solicitous that the threat of substantial liability not unduly chill government agencies and their officials from taking appropriate action in the public interest. The excessive and unpredictable awards that result from a jury instruction such as that approved by the court of appeals, however, will have the unfortunate effect of overdeterring government officials at every level from the vigorous decisionmaking that is appropriate to their exercise of discretion in the public interest.[17]

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that a new trial on damages was required because "the jury * * * was permitted to award more than liberal compensation for actual harm." *Id.* at 1125.

[17] We also note the increasing burden being placed on municipalities by the prospect of substantial damages awards and the difficulty and cost of obtaining liability insurance. See, *e.g.*, N.Y. Times, Sept. 30, 1985, at B1; Committee on Local Governments, New York State Assembly, "*Deep Pockets*" *A Study of Municipal Tort Liability* 10-11 (1985). See generally *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (excessive liability exposure for municipalities "may create a serious risk to the financial integrity of these governmental entities").

The Court's decision in *Carey* maintained a workable balance "[b]y making the deprivation of * * * rights actionable for nominal damages without proof of actual injury, * * * [while] remain[ing] true to the principle that substantial damages should be awarded only to compensate actual injury." 435 U.S. at 266; cf. *Owen* v. *City of Independence*, 445 U.S. 622, 657 (1980) (where harm is caused by governmental policy, public must bear "the costs of [the] injury inflicted"). Where actual injury has resulted from a constitutional violation, juries are not and should not be restrained from compensating the plaintiffs upon appropriate proof. But instructing the jury to award substantial damages based on its assessment of the intrinsic worth of the constitutional guarantees at stake is nonsense. The resulting awards will neither fairly compensate the plaintiffs nor provide a reasonable and measured deterrent to public agencies and officials. To the contrary, they will often be simply a thinly disguised form of punitive damages, unrestrained by the immunities and proof and proportionality requirements that properly limit such an extraordinary form of relief. See generally *City of Newport* v. *Fact Concerts, Inc.*, *supra* (municipalities immune from punitive damages under Section 1983); *Smith* v. *Wade*, 461 U.S. at 51 (punitive damages available under Section 1983 only for "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MEMPHIS COMMUNITY SCHOOLS, ET AL.,

Petitioners,

—v.—

EDWARD J. STACHURA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE RESPONDENT

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No. 85-410

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Memphis Community Schools, et al.
Petitioners,

v.

Edward J. Stachura,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE
THE AMERICAN CIVIL LIBERTIES UNION IN
SUPPORT OF THE RESPONDENT

STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) is a non-profit membership organization, organized for the purpose of protecting the free and full exercise of personal freedom under the Constitution of the United States. The American Civil Liberties Union was founded in 1920 and consists of 50 state affiliates, some 350 local chapters and more than 250,000 members throughout the United States whose interest the ACLU represents.

The availability of a damage remedy under 42 U.S.C. § 1983 to redress violations of Constitutional rights is of significant interest to the ACLU and its members. Section 1983 awards are critical to the protection of constitutional rights. Hence, the ACLU is concerned that the historical ability of the

courts to award full compensation for the loss of such rights remain intact.

STATEMENT OF THE CASE

In the interest of judicial economy, amicus curiae ACLU, adopts largely the recitation of facts in the district and appellate court opinions and set forth in the Brief for the Respondent. However, it is useful to briefly recount the facts which are particularly material to the substantive issue before the Court.

Respondent Stachura is an experienced and tenured teacher in the Memphis, Michigan Community School District. During the 1978-1979 school year he was responsible for teaching seventh grade classes in life science. In teaching the life science class, Stachura used texts which had been

approved by the school board itself. 763 F.2d at 213. The record of the case indicates that Stachura had consulted with and secured the principal's approval of his teaching methods relating to the human reproduction aspect of the course.

In April 1979, Respondent showed his students two films concerning human reproduction. These films were provided by the county health department, had been shown for a number of years in a Memphis school, and were shown pursuant to the direction of the school principal. 763 F.2d at 214. Although these films had previously been shown to other seventh grade classes, this showing led to community protest. When the school board met on April 23, 1979, a number of parents vehemently attacked Respon-

dent. As the Court of Appeal states, when that public protest arose, "neither the administrative officials of the school nor the school board itself saw fit to defend the embattled teacher, or publicly to assume responsibility for their own decisions." 763 F.2d at 213-214.

Instead, on April 24, 1979, Respondent Stachura was suspended by the superintendent of the school board and told that he would "never see the inside of a Memphis classroom again." The Board confirmed Stachura's suspension on May 21, 1979. On May 29, 1979 the superintendent handed Stachura a letter of reprimand based on unsubstantiated allegations of one of the community protesters. 763 F.2d at 214. Stachura was subsequently informed by the Board

that his rights under his teacher's contract would not be restored unless he accepted the letter of reprimand.

Mr. Stachura then brought this action against the school district, school board, and individual members of the Board of Education, pursuant to 42 U.S.C. § 1983, alleging that petitioners violated his first amendment rights as a teacher, as well as his fourteenth amendment guarantees of liberty and property. The jury found, responding to special interrogatories, that each petitioner had violated Stachura's first amendment rights (Jt. App. at 98-99); liberty and property interests (Jt. App. 99); and rights to due process of law (Jt. App. 99). Stachura was awarded a total of $266,000.00 compensatory

damages and $36,000.00 in punitive damages. (Petn. App. A1-A3).

The District Court upheld these elements of the jury's award, finding sufficient evidence that Plaintiff Stachura's first amendment rights were infringed. Further, the District Court concluded that Stachura had a property interest in his employment and a liberty interest in his good name, both of which had been infringed without procedural due process. The District Court found that its damage instructions were justified because of "the mental anguish, destruction of reputation, and personal humiliation which arguably flowed from the [Petitioners'] actions." (Petn. App. B8).

The United States Court of Appeals for the Sixth Circuit affirmed the

District Court's decision, without dissent. 763 F.2d at 211; Pet. App. C1-C8. The Court of Appeals noted that there was

> "ample proof of actual injury to Plaintiff Stachura both in his effective discharge by the Memphis Community School District and by the damage to his reputation and to his professional career as a teacher. Contrary to the situation in Carey v. Piphus, 435 U.S. 247 (1978), relied on by [Petitioner] school district, there is proof from which the jury could have found, a it did, actual and important dama es."

763 F.2d at 214. The court also refused to reduce damages as "Stachura suffered the embarrassment of extensive publicity in the local media which repeated the allegations against him, which included that he was a 'sex maniac.'" 763 F.2d at 215. The Court of Appeals noted that Stachura suffered harassment, mental distress, and damages that would "affect

his professional career for his entire lifetime." Id.

This Court granted certiorari upon Petitioner's claim that the decision of the Court of Appeal arguably conflicted with Carey v. Piphus, 435 U.S. 247 (1978), and posed an issue dividing the lower courts, namely whether proof of consequential injuries are required for an individual to receive more than a nominal compensatory damages award for violation of substantive constitutional rights. This issue, as it applies generally to constitutional tort actions, is the basis of the ACLU's interest; the argument herein is accordingly directed to this issue. Amicus believes, however, that there may well be merit in Respondent's position that this legal question is not properly

presented in this case as Petitioners failed to properly preserve their objection to the damage instruction under Fed. R. Civ. Proc. 51 and further, "there was ample proof of actual injury" to Stachura. Indeed, the presence of such consequential injury appears to be the basis of the Court of Appeals decision. 763 F.2d at 214.

SUMMARY OF ARGUMENT

The denial of a constitutional right, simply put, is an actual injury. Petitioners and supporting amici appear to suggest that unless the denial of a constitutional right, no matter how grievous, is manifested in either physical injury, property damage or emotional distress, the victim is entitled to no more compensation than a token dollar. They urge the Court to

adopt this precept as a rule for all damage cases arising from abridgments of constitutional rights.

Such a view inaccurately reflects both the letter and purpose of Section 1983 and this Court's prior cases interpreting that statute. The principle that a jury may consider the value of the constitutional right which was violated in arriving at its damage award is not a new proposition, but one which traditionally has been followed in cases involving constitutional violations. Questions over this approach have arisen only through a misreading of this Court's decision in Carey v. Piphus, 435 U.S. 247 (1978). In Carey, this Court held that plaintiffs could not recover substantial damages under Section 1983 for a violation of procedural due

process without proof of actual injury. This Court expressly limited its holding to cases involving the denial of procedural due process. Impliedly, through recognition of the line of cases allowing substantial damages without consequential injury for the denial of the right to vote, the Court acknowledged that compensation for substantive constitutional violations must be measured by standards appropriately reflective of the particular constitutional right involved. Allowing juries to award compensatory damages for the value of a constitutional right is further required to serve § 1983's twin purpose of providing full compensation for the loss of constitutional rights and of deterring such deprivations from occurring.

The question of whether the jury which awarded Respondent damages was properly instructed is an issue of a different magnitude, one on which this Court should give considerable deference to the trial court, which heard the testimony, and to the Court of Appeals, which affirmed the District Court's findings. The charge to the jury that they "may" award damages to compensate Plaintiff for the deprivation of his constitutional rights, and that the jury "may" consider the importance of such rights historically and in the context of the activities in which the Plaintiff was engaged in at the time of the violation of the right, hardly constitutes an objectionable instruction. Moreover, the instructions to the jury must be viewed as a whole. So considered, the

jury was properly instructed that they must not award speculative damages, and that the award should be reasonable and calculated to place Respondent in the position he would have occupied, but for the constitutional tort.

ARGUMENT

I. DEPRIVATION OF A SUBSTANTIVE CONSTITUTIONAL RIGHT IS AN "ACTUAL INJURY" PROPERLY COMPENSATED BY DAMAGES.

A. Substantial Damages Historically Have Been Awarded for Violations of Constitutional Rights.

That damages are an appropriate remedy for the violation of constitutional rights has long been recognized. Justice Holmes pointed out that "the deprivation of a man's political and social rights properly may be alleged to involve damage . . . capable of estimation in money." Giles v.

Harris, 189 U.S. 475, 485 (1903). In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971), this Court recognized that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."

The concept that a violation of one's constitutional right may be redressed by an award of substantial damages for the loss of that right, entirely apart from any consequential injuries to person and property, is hardly a novel conception. In writing for the court in Nixon v. Herndon, 273 U.S. 536 (1927), Justice Holmes, in sustaining a $5,000 damage award in an action against judges of elections for refusing to permit the plaintiff to

vote, noted "that private damage may be caused by such political action and may be recovered for in a suit at law, hardly has been doubted for over two hundred years." Id. at 540. Authority for awarding such damages dates back to the English precedent of Ashby v. White, 92 Eng. Rep. 126 (1703).1/ That a

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1/ The trial court awarded damages of 200 pounds where the only injury to plaintiff was a violation of his right to vote. Though the judgment of the trial court was reversed by the King's Bench, Lord Holt dissenting, the trial court's verdict was reinstated by the House of Lords, stating that the deprivation of a civil right imports an injury remedied by an award of damages even though that injury is difficult to prove. The deterrent aspect of such an award was emphasized: "[t]o allow this action will make public officers more careful to observe the constitution of cities and boroughs." 92 Eng. Rep. at 137. For a discussion of the development of awarding damages for the denial of the right to vote in this country, see Annot. 153 A.L.R.
(Continued)

plaintiff is entitled to compensation for the intangible constitutional loss suffered when voting rights are denied has been recognized both by this Court and other federal courts. See Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, supra; Wayne v. Venable, 260 F. 64 (8th Cir. 1919).2/

Given the well-established practice of awarding damages for the denial of the right to vote, it is unreasonable to suggest that Congress, in adopting

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109 (1944).

2/ Early English cases, which this Court has recognized the Framers knew of and relied on, also approved substantial damages for interest in liberty well beyond consequential damages. See Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep 768 (1763); Wilkes v. Wood, 98 at Eng. Rep. 489; Entick v. Carrington, State Trial, XIX, 1029 (1755).

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13 (later codified at Title 42 U.S.C. § 1983), intended either to narrow the damage remedies available to redress constitutional violations or to grant less protection to violations of constitutional rights other than the right to vote. On the contrary, Section 1983 was expansively drafted to provide full redress for the abridgment of constitutionally protected liberties.[3/] The statutory language does not

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3/ 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

(Continued)

restrict damages to consequential events such as loss of livelihood, harm to property, or medical expenses. In no place does the statute provide that only where the loss of a constitutional right is exacerbated by such further damage that substantial monetary relief may be had. On the contrary the statute equates a citizen who has been deprived of "any rights . . . secured by the constitution" with the "party injured". The Framers of Section 1 of the Civil Rights Act of 1871 understood the denial of a constitutional right to constitute an "actual injury".[4/]

> other proper proceeding for redress.

4/ This is further reflected by the statute's affording the party injured a "suit in equity or other proper proceeding for redress." It has never been suggested that the equitable powers of a court in a

(Continued)

Given the well-established precedent for substantial compensations upon losses of political rights such as the right to vote, it is understandable that the legislative history of Section 1 of the Civil Rights Act of 1871 does not contain passages shedding much light on the particular question. This Court's frequent interpretations of § 1983 have distilled the teachings of the legislative history of that statute. Congress intended to "create a species of tort liability" in favor of persons who are deprived of rights, privileges or immunities secured" to them by the Constitution. Imbler v. Pachtman, 424 U.S. 409,

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case arising under § 1983 could be exercised only where the act to be enjoined threatens consequential injury beyond the abridgment of the constitutional right itself.

417 (1976); Carey v. Piphus, 435 U.S. at 253.[5]

Further, the 42nd Congress' creation of a private remedy for persons suffering from racial discrimination in voting registration and imposing a per se $500.00 award for any person so aggrieved suggests that Congress believed civil damages were an appropriate remedy for the loss of an

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[5] Petitioners' citations to excerpts from the Congressional debate, Brief for the Petitioner at 12-15, indicates only that Congress intended to provide redress for persons injured by the deprivation of constitutional rights. The debates provide no basis for Petitioners' assertion that a person whose constitutional rights have been abridged is not "a person injured" unless he has suffered consequential damages.

intrinsic right. See Act of May 3, 1870, 16 Stat. 140.6/

B. Cases Interpreting § 1983 Support the Award of Compensatory Damages for the Denial of a Substantive Constitutional Right.

Both this Court and other federal courts have affirmed awards of substantial damages as compensation for the violation of substantive constitutional rights, not just for related consequential damages. See Bivens v. Six Unknown Federal Narcotics Agents,

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6/ While Section 1 of the 1871 Act was "modeled" after Section 2 of the 1866 Civil Rights Act, Monroe v. Pape, 365 U.S. 767, 185 (1961), that has no bearing on the question of damage awards currently before the Court. Contrary to Petitioners' assertions, Brief for the Petitioners at 12-13, it is not at all apparent how Representative Bingham's commentary supports the view that Congress, in adopting the 1871 Civil Rights Act, intended to limit the damage remedies available under that statute.

403 U.S. 388 (1971); Monroe v. Pape, 365 U.S. 167, (1961); Nixon v. Herndon, 273 U.S. 356 (1927); Herrera v. Valentine, 653 F.2d 1220, 1231 (8th Cir. 1981); Flores v. Pierce, 617 F.2d 1386, 1392 (9th Cir. 1980), cert. denied 449 U.S. 875; Brule v. Southworth, 611 F.2d 406, 411 (1st Cir. 1979); Konczak v. Tyrrell, 607 F.2d 13, 17-18 (7th Cir. 1979), cert. denied 444 U.S. 1016 (1980); Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979); Simineo v. School District No. 16, 594 F.2d 1353, 1357 (10th Cir. 1979); Stoddard v. School District No. 1, 590 F.2d 829, 835 (10th Cir. 1979); Dellums v. Powell, 566 F.2d 167, 194-196 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); Tatum v. Morton, 562 F.2d 1279, 1281-1285 (D.C. Cir. 1977); Linn v. Garcia, 531 F.2d 855, 860 (8th Cir.

1976); Redmond v. Baxley, 475 F. Supp. 1111, 1121-22 (E. D. Mich. 1979). Manzfredonia v. Barry, 401 F. Supp 762, 770-772 (E.D.N.Y. 1975).

Petitioners' rely on Carey v. Piphus, 435 U.S. 247 (1978), for the proposition that substantial damages cannot be awarded for the deprivation of a constitutional right unless that deprivation is associated with consequential injury to person or property. In Carey, the plaintiffs were two students who had been suspended from school without due process. Although substantial damages were awarded, no finding had been made as to whether the respondents would have been suspended if they had received procedural due process. 435 U.S. at 252-53.

The Court granted certiorari on the question of whether for a deprivation of procedural due process, the plaintiff must prove he actually was injured by the deprivation before he may recover substantial non-punitive damages. Id. at 253. The Court held that for a violation of procedural due process, absent proof of actual consequential injury, the plaintiff is limited to an award of nominal damages.

This holding should not be given a broader reading than the question the Court sought to answer: what damages are proper for a deprivation of procedural due process. Indeed, the Court specifically noted that its holding was so limited:

> [T]he elements and prerequisites for recovery of damages appropriate to compensate injuries caused by

> the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. . . Those issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question.

435 U.S. at 265.

The "nature of the interests protected" by procedural due process differs from the interests protected by substantive constitutional guarantees. Procedural due process rights are triggered by liberty or property interests, see Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). Accordingly, it is appropriate that the value of a deprivation of procedural due process be measured with respect to the liberty and property interests the procedures are designed to protect. As this Court noted in Carey,

"procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." 435 U.S. at 259. The Court in Carey also distinguished the effects of substantive and procedural deprivations:

> Where the deprivation of a protected interest is substantively justified but procedures are deficient in some respect, they may well be those who suffer no distress over the procedural irregularities.
>
> . . . Moreover, where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. . . . The injury caused by a justified deprivation, including distress, is not properly compensable under § 1983. 435 U.S. at 263.

435 U.S. at 263 (footnote omitted). By comparison in this case, and in all

cases where the finding of a substantive violation of one's constitutional rights has been raised, there cannot be a "justified deprivation."

Following Carey, a number of courts have recognized this distinction and have held that Carey does not apply when a substantive constitutional violation is at hand. In Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), aff'd in part, 452 U.S. 713 (1981), a case involving the denial of Fourth Amendment rights to a electronic surveillance, the District Court--believing that no actual injury had been established--awarded nominal damages of $1.00. Halperin v. Kissinger, 434 F. Supp. 1193, 1195 (D.C. 1977). The District of Columbia Circuit reversed, holding that Carey's "proof of actual damages" requirement did not

apply to Fourth Amendment violations because the substantive right to be free from unlawful searches was of a different character than procedural due process rights. 606 F.2d at 1207-08 and n. 100. In Corriz v. Naranjo, 667 F.2d 892, cert. dismissed, 458 U.S. 1123 (10th Cir. 1981), Court concluded that "substantial damages, both compensatory and punitive, may be awarded for the violation of substantive constitutional rights." Id. at 897. See also Herrera v. Valentine, 653 F.2d 1220, 1228 (8th Cir. 1981) ("to secure complete satisfaction, damage awards must take account of the intrinsic dimension that envelopes each substantive constitutional right"); Bell v. Little Axe Independent School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985) (plaintiff entitled to com-

pensatory damages for loss of inherent value of Establishment Clause rights); Mickens v. Winston, 462 F. Supp. 910, 913 (E.D.Va. 1978), aff'd 609 F.2d 508 (4th Cir. 1979) (consequential damages may be awarded without proof of actual injury from racial segregation).7/

C. The Compensatory and Deterrence Purposes of § 1983 Would be Undermined by Limiting Damage Awards to Nominal Amounts, Absent Consequential Injuries.

Insofar as the purpose of an award under § 1983 is to compensate persons

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7/ In Owen v. Lash, 682 F.2d 648, 658 (7th Cir. 1982), the Court of Appeals, in an opinion by Justice (Retired) Stewart, observed that "rather than overrule this fairly long line of cases awarding damages even in the absence of proof of consequential injury, the Supreme Court in Carey chose to distinguish these cases and expressly to reserve judgment as to their merits."

for injuries caused by the deprivation of constitutional right, Carey v. Piphus, 435 U.S. at 254, that objective cannot be achieved if no compensation is permitted for the loss of the constitutional right itself. Compensation for tangible injuries and such intangibles as emotional distress do not redress the full injury suffered by the victim. Indeed, the occurrence of such harm may bear only a coincidental relationship to the constitutional violation. Many victims of unconstitutional conduct will not suffer such consequential injury, and the amount of consequential harm incurred may only be fortuitously related to the constitutional deprivation. For example,

> [I]f a book is ceased in violation of the First Amendment, the author would recover the value of the

> printed material, but not the value of his right to express his views. Law enforcement officials who break into a citizen's home and place a wiretap would be liable for the proven physical damage to his property or for personal embarrassment but not for the loss of his Fourth Amendment expectation of privacy in his home and possessions. A person tried, but not convicted, on evidence obtained in violation of the Fifth Amendment would be entitled to no compensation whatever for the violation of his privilege against self-incrimination.

Note, Damage Awards for Constitutional Torts: a Reconsideration after Carey v. Piphus, 93 Harv. L. Rev. 966, 976-77 (1980) (footnotes omitted). This perspective would turn the notion of constitutional rights on their head, as it is the constitutional violation and not the consequential events that is the essence of a § 1983 case. See Boyd v. United States, 116 U.S. 616, 630 (1886) (Bradley J.) ("it is not the breaking of

his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . ."). Petitioners would have this Court elevate the collateral consequences of the violations of constitutional rights and ignore the primary value of the right itself.

The incidental relationship between such consequential injury and meaningful protection of constitutional rights was recognized by Justice Harlan in his concurrence in Monroe v. Pape, supra:

> Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violation of common-

> law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

365 U.S. at 196, n. 5 (Harlan J., concurring). By contrasting the damages in a trespass action to that the Court was providing pursuant to § 1983, Justice Harlan clearly believed that more than consequential damages would be available under the federal remedy. A merely symbolic award of a single dollar, which is all that petitioners believe appropriate for the loss of a constitutional right, denigrates the significance of the constitutional rights Justice Harlan believed that § 1983 was intended to protect. See also C. McCormick, Handbook of the Law of Damages, § 24 at

95-96 (1935) (nominal damages meaningless).

In addition to the interest in fully compensating victims of constitutional torts, § 1983 was intended to deter violations of constitutional rights. Owen v. City of Independence, 445 U.S. 622, 651-652 (1980). In Imbler v. Pachtman, Justice White noted that deterrence was "precisely the proposition upon which § 1983 was enacted," 424 U.S. 409, 442 (1976) (White J. concurring). The legislative history of § 1983 emphasizes the deterrence aspect of its purpose. See Monroe v. Pape, 365 U.S. 167, 174-80 (1961) (reviewing legislative history). See generally Nahmod, "Section 1983 and the Background of Tort Liability", 50 Ind. Law Journal 5, 32-33 (1974). Although substantial

damage awards for consequential injuries may promote deterrence as a by-product, a proper level of deterrence depends upon the granting of full compensation for the rights involved. See R. Posner, Economic Analysis of Law at 78 (1973) ("the right amount of deterrence is produced by compelling negligent injurers to make good the losses of the victim"). If constitutional tort damage awards were limited to consequential injuries, the deterrence function would be undermined as consequential harms do not always accompany a violation of constitutional rights.

Deterrence is not satisfied by the availability of punitive damages, which generally require the presence of malicious intent, see generally S. Nahmod, Civil Rights and Civil Liberties Litiga-

tion, § 4.08-.12 and which are unavailable in actions against municipalities. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). Accordingly, the twin purposes of compensating and deterring constitutional violations require that the essence of the constitutional violation--the value of the substantive constitutional right itself--be an element for which a jury, in proper circumstances, may award substantial compensatory damages. To reach this conclusion, the Court need not hold that such damages are always appropriate. But to accept Petitioners' view would be to hold that compensation for the lost constitutional right is never to be allowed.

II. AN INSTRUCTION THAT THE JURY MAY AWARD COMPENSATORY DAMAGES BASED ON THE INTRINSIC VALUE OF A SUBSTANTIVE CONSTITUTIONAL RIGHT IS NOT REVERSIBLE ERROR.

Assuming that this Court finds that an award of compensatory damages for the denial of a constitutional right is permissible, the question becomes whether this Court should reverse the two lower courts on the question of whether the jury was properly instructed. Although the issue is a matter of law, the Court may well defer to the trial court, which heard the evidence and the argument of counsel firsthand, and to the Court of Appeals, which affirmed the award.

Petitioners and supporting amici focus on the following instruction to the jury on damages:

> If you find that the plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place on constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.
>
> The precise value you place upon any Constitutional right which you find was denied to plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance of the right in the context of the activities which the plaintiff was engaged in at the time of the violation of the right.

(Pet. App. 86). The above instruction to the jury accurately reflects the

law. The instruction does not tell the jury to "presume" damages. Indeed it does not direct that the jury must award damages for the constitutional violation. Rather, the instruction states that "if you find that plaintiff has been deprived of a constitutional right, you may award damages to compensate him". The direction that lost rights not capable of precise evaluation are nevertheless compensable is an accurate statement, which this Court itself set forth in Carey v. Piphus, 435 U.S. 247 (1978). Further, it appears perfectly proper for a jury, in arriving at a damage figure for the loss of a constitutional right, to consider the importance of that particular right in "the context to the activities" in which the plaintiff was engaged. This sensible

and balanced instruction, which also has been approved by the Eighth Circuit, see Herrera v. Valentine, 653 F.2d 1220, 1227 (8th Cir. 1981), is, even standing alone, unobjectionable.

Of course, the instruction should be read together with the balance of the charges. Congress and Empire Spring Co. v. Edgar, 99 U.S. 645, 659 (1878). The court instructed the jury that the damages it finds must be "reasonable", (App. 1882). Further, the jury was instructed to award

> only such damages as will reasonably compensate Respondent for such injury and damages as you find from a preponderance of the evidence in the case that he sustained as a proximate result of defendant's violation of his civil rights.

(App. 1882). The jury was told that it could not award "speculative damages" or

any compensation which is "remote or conjectural, or which has not been proven." (App. 1882). The court further instructed the jury that Respondent should be placed "in the same position he would be in if his civil rights had not been violated." (App. 1882).

At bottom, Petitioners' argument is simply that the jury returned a more substantial award than Petitioners believed appropriate. The issue of whether a remittitur was in order is hardly a matter requiring the Supreme Court's intervention. The District Court upheld the award, and the Court of Appeals stated "there was proof from which a jury could have found, as it did, actual and important damages." 763 F.2d at 214. There are many cases upholding substantial compensatory

awards for constitutional deprivations. See, e.g., City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 252 (1981) (compensatory award of in excess of $70,000.00); Herrera v. Valentine, 653 F.2d 1220, 1231 (8th Cir. 1981) (award of $300,000.00); Flores v. Pierce, 617 F.2d 1386, 1392 (9th Cir. 1980) cert. denied, 449 U.S. 875 (award of $48,500.00); Simineo v. School District No. 16, 594 F.2d 1353, 1357 (10th Cir. 1979) (award of $60,000.00); Stoddard v. School District No. 1, 590 F.2d 829, 835 (10th Cir. 1979) (award of $33,000.00); Redmond v. Baxley, 475 F. Supp. 1111, 1121-2? (E.D. Mich. 1979) (award of $130,000.00); Corriz v. Naranjo, 667 F.2d 892, 898 (10th Cir. 1981) (award in excess of $60,000.00), cert. dismissed, 458 U.S. 1123 (1982).

An award of substantial damages to Stachura reflects the jury's judgment of the seriousness of the constitutional violation at hand. As this Court said in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. Sheldon v. Tucker, 364 U.S. 479, 487 (1965). "The classroom is peculiarly the 'marketplace of ideas.'"

Further, as stated by the Court of Appeals in Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979), aff'd by an equally divided court, 452 U.S. 713 (1981):

> In cases involving constitutional rights, compensation should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of

> the right. Specifying such damages will always be difficult, but they must be at least an amount which will assure the plaintiff that personal rights are not likely to be disregarded and that they can be truly vindicated in the courts.

See also Corriz v. Naranjo, 667 F.2d at 899. The jury's award in this case, where there was evidence of considerable injury to Respondent's career which would last a lifetime and of serious violations of his First Amendment rights, does not warrant reduction by this Court.

CONCLUSION

For the aforesaid reasons, amicus curiae, The American Civil Liberties Union, urges that the judgment of the United States Court of Appeals for the Sixth Circuit be affirmed.

Respectfully submitted,

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